COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY

INTRA AGENCY MEMORANDUM

TO: File

FROM: Karen G. Sabasteanski kgs

SUBJECT: Public Participation Report for NOIRA concerning Regulation Revision G20, Site Suitability

DATE: July 12, 2021

BACKGROUND

In accordance with the board's regulatory public participation procedures (9VAC5-5), the department published a notice of intended regulatory action (NOIRA) for regulations concerning site suitability

CERTIFICATION OF PUBLIC NOTICE

Notice of the intended regulatory action was given to the public in the Virginia Register on May 10, 2021 (see Enclosure I). In addition, personal notice of the opportunity to comment was given by mail to those persons on the department's list to receive notices of intended regulatory actions. Accordingly, a public comment period was held from May 10 to July 9, 2021 to receive any public input concerning the NOIRA.

SUMMARY OF PUBLIC PARTICIPATION ACTIVITIES

Ten written comments were received during the public comment period, including one identical email sent by 143 persons. The complete text of all comments is attached as Enclosure II.

TEMPLATES\NOIRA\PC00
REG\DEV\G20-PC00

Enclosure

ENCLOSURE I

STATE AIR POLLUTION CONTROL BOARD
INTENDED REGULATORY ACTION

PUBLIC NOTICE

July 12, 2021
Richmond, Virginia

The public was given notice of the meeting in the Virginia Register on May 10, 2021 (copy attached).

TEMPLATES\NOIRA\PC01
REG\DEV\G20-PC01

TITLE 9. ENVIRONMENT

STATE AIR POLLUTION CONTROL BOARD

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Air Pollution Control Board intends to consider amending **9VAC5-80, Permits for Stationary Sources**, and **9VAC5-170, Regulation for General Administration**. The purpose of the proposed action is to provide greater detail as to how the site suitability requirements of § 10.1-1307 E of the Code of Virginia will be carried out in the permitting process. Section 10.1-1307 E provides that the board in making regulations and in approving variances, control programs, or permits shall consider facts and circumstances relevant to the reasonableness of the activity involved and the regulations proposed to control it. Currently, these criteria are examined on a case-by-case basis, however, setting forth the parameters the board and the agency will use to implement these criteria in the context of air permitting will provide clarity for the regulated community and the public. The intent of this action is to consider amending the regulations to provide greater detail as to how the requirements of § 10.1-1307 E are to be met, with the goal of greater consistency, clarity, and effectiveness of the site suitability determination process.

The agency intends to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: § 10.1-1308 of the Code of Virginia; Clean Air Act §§ 110, 112, 165, 173, 182 and Title V; 40 CFR Parts 51, 61, 63, 70, and 72.

Public Comment Deadline: July 9, 2021.

Agency Contact: Karen G. Sabasteanski, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4426, or email karen.sabasteanski@deq.virginia.gov.

VA.R. Doc. No. R21-6537; Filed April 8, 2021, 8:36 a.m.

ENCLOSURE II

PUBLIC COMMENT PERIOD, COMMENTS RECEIVED

July 12, 2021
Richmond, Virginia

Included is the complete text of all comments received during the public comment period.

TEMPLATES\NOIRA\PC02
REG\DEV\G20-PC02

CHESAPEAKE BAY FOUNDATION
Saving a National Treasure

July 9, 2021

Karen G. Sabasteanksi
Air Regulatory Policy Analyst
Department of Environmental Quality
1111 E. Main Street, Suite 1400
Richmond, VA 23218

VIA ELECTRONIC SUBMISSION

RE: Site Suitability Notice of Intended Regulatory Action Comments

Dear Ms. Sabasteanski:

On behalf of Chesapeake Bay Foundation ("CBF"), we are writing to provide comment in response to the Notice of Intended Regulatory Action ("NOIRA") the Virginia Department of Environmental Quality ("DEQ") recently issued regarding the development of proposed revisions to its regulations at 9 VAC 5-80 (Permits for Stationary Sources) and 9 VAC 5-170 (Regulation for General Administration) to set forth the parameters DEQ and the State Air Pollution Control Board (the "Board") will use to implement the statutory considerations of the State Air Pollution Control Law regarding site suitability for proposed activity in Va. Code § 10.1-1307(E).

CBF's mission—carried out from offices in Virginia, Maryland, Pennsylvania, and the District of Columbia—is to restore and protect the ecological health of the Chesapeake Bay, the nation's largest and one of its most vital estuaries. CBF's mission also includes a commitment to diversity, equity, inclusion, and justice, including a recognition that everyone is entitled to environmental justice. Accordingly, and on behalf of our 300,000 members and e-subscribers across the United States, we engage in a variety of issues (including airborne, as well as waterborne, pollutants) that will impact the health of the Chesapeake Bay and of those who live and work within the Bay watershed. The proposed amendments to the Board's Stationary Source and General Administration regulations that set forth parameters for considering the reasonableness of a proposed air pollution activity, including the suitability of the site for the proposed activity and the population it will impact, are an important opportunity to ensure the regulations protect vulnerable communities from the disproportionate impact of air pollution.

CBF has been deeply involved with application of the statutory considerations in Va. Code § 10.1-1037(E). Among other efforts, we served as a plaintiff in the

landmark case *Friends of Buckingham v. State Air Pollution Control Board*[1] in which the U.S. Court of Appeals for the Fourth Circuit set forth requirements for evaluating site suitability as it relates to environmental justice communities and evaluating the disproportionate impacts of proposed emissions sources on specific low income and minority communities. Our comments below are drawn from our experience in that case and other work on environmental justice.

I. Meeting the Legal Mandates

While the NOIRA states that the purpose of the proposed action is to provide greater detail as to how the site suitability requirements of Va. Code § 10.1-1307(E) will be carried out in the permitting process, it is clear that the Court's mandate in *Friends of Buckingham* must inform DEQ's approach to promulgating site suitability regulations. When conducting the site suitability analysis for the compressor station at issue in *Friends of Buckingham*, DEQ looked only at a site evaluation, a special use permit issued by Buckingham County, and projected compliance with national ambient air quality standards. The Court found this evidence to be "incomplete, improper, and rendered unreasonable" by subsequent evidence in the permit proceedings.[2] The Court also held it was improper for the Board to rely on a special use permit as a substitute for an independent determination of site suitability.[3]

In addition to *Friends of Buckingham*, site suitability analysis must be coordinated with the Virginia Environmental Justice Act ("EJ Act"). The EJ Act, enacted in 2020, established as the policy of the Commonwealth the promotion of environmental justice, which includes the fair treatment and meaningful involvement of every person.[4] The Act defines fair treatment to mean "the equitable consideration of all people whereby no group of people bears a disproportionate share of any negative environmental consequence resulting from an industrial, governmental, or commercial operation, program, or policy."[5] DEQ's statutory purposes were also amended by the General Assembly to include furthering environmental justice and enhancing public participation in the regulatory and permitting processes.[6]

As the Board considers the proposed regulations, it must be guided by the *Friends of Buckingham*, the EJ Act, and its statutory purpose of promoting environmental justice. Specifically, DEQ must discontinue reliance on local land use determinations[7] in its site suitability analysis, conduct an evaluation of the local community to determine whether it is an environmental justice community, determine the potential degree of injury the community faces from the proposed activity, and whether that injury rises to the level of being a disproportionate

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[1] *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020).
[2] *Friends of Buckingham*, 947 F.3d at 93.
[3] *Id.*
[4] Va. Code § 2.2-234.
[5] *Id.*
[6] Va. Code § 10.1-1183.
[7] It is clear from recent site suitability analysis that DEQ continues to "give weight to decisions by a local governing body as to the general suitability or a proposed new facility . . ." in contradiction of *Friends of Buckingham* – *See* DEQ Response to Comments for the Lambert Compressor Station, p. 15, *available at*: https://townhall.virginia.gov/L/GetFile.cfm?File=Meeting\1\32635\Agenda_DEQ_32635_v4.pdf This is also contrary to state law which provides that DEQ and the Board cannot rely on local land use decisions in determining site suitability. 9 Va. Admin. Code 5-80-1230.

impact.[8] Below, CBF identifies considerations DEQ should incorporate into its proposed site suitability regulations.

II. Characterizing the Local Population

One of the first steps in analyzing site suitability is characterizing the local population that could be affected by the proposed activity. This analysis implicates sections 1-3 in the site suitability statute (addressing "the character and degree of injury to, or interference with, safety, *health*, or the reasonable use of property which is caused or threatened to be caused," "the *social* and economic value of the activity involved;" and "the suitability of the activity to the area in which it is located.")[9] In *Friends of Buckingham*, the Court found that assessing the character of the local population is inextricably linked with, and is a predicate to, assessing the suitability of the activity of the site.[10] While there are many tools for assessing a local population, none can replace actual engagement, on the ground, with potentially affected residents. Effective engagement will help determine whether affected populations have characteristics that would not be captured by a simple desktop analysis, such as a population's specific public health indicators including poverty rates, disability statistics, and other vulnerabilities a population may have.

In analyzing site suitability in *Friends of Buckingham* and other contexts, it has become clear that reliance on EPA's EJSCREEN tool is insufficient as a means of characterizing local populations. As a tool, EJSCREEN was never intended to be utilized as a final determination of the character of a community or as a basis for contemplating the extent of potential harm from additional environmental stressors. EPA itself cautions that EJSCREEN is only intended to "highlight places that may be candidates for further review, analysis or outreach to support the agency's environmental justice work."[11] While EJSCREEN may be a helpful starting point in analyzing local populations that may be affected by a proposed activity, it is not a "detailed risk analysis" because it "balances a desire for data quality and national coverage against the goal of including as many important environmental factors as feasible."[12] Further, EJSCREEN cannot accurately account for emissions, ambient levels in the air, exposure of individuals, pre-existing health risks of the local population, or toxicity. Together, EPA and the Fourth Circuit have made it clear that EJ SCREEN results must be supplemented with additional efforts to engage with and accurately characterize the local population.

III. Considering the Potential Degree of Injury

After appropriately characterizing the local population, the site suitability regulations must require an evaluation of the potential degree of injury to the local population from the proposed activity. Importantly, the question of whether regulators can rely on compliance with

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[8] DEQ acknowledged in *Friends of Buckingham* that considering the potential for disproportionate impacts to minority and low-income communities is part of the site suitability analysis process. *Friends of Buckingham*, 947 F.3d at at 87 (quoting Brief of Respondents at 53).
[9] Va. Code § 10.1-1307(E); 9 VAC 5-170-170 (emphasis added).
[10] *Friends of Buckingham*, 947 F.3d at 86.
[11] Limitations and Caveats in using EJSCREEN, Environmental Protection Agency, *available at*: https://www.epa.gov/ejscreen/limitations-and-caveats-using-ejscreen#:~:text=EJSCREEN%20cannot%20provide%20data%20on,complete%20picture%20of%20a%20location
[12] *Id.*

National Ambient Air Quality Standards ("NAAQS") to determine the degree of injury to an EJ community has already been resolved by *Friends of Buckingham*, which held that DEQ cannot "blindly rely" on NAAQS and that doing so "is not a sufficiently searching analysis of air quality standards for an EJ community." To do so, renders Section 1307(E) meaningless.[13] DEQ's regulations must conform to the Court's holding.[14]

In considering the potential degree of injury to local populations, there are several sources, independent of NAAQS and state emissions standards, that DEQ should consider. As a first step, DEQ must consider other sources of air emissions in the vicinity of the proposed project. In addition, it is also necessary to consider other factors that influence a community's vulnerability to criteria pollutants such as the location of other intensive land uses, like landfills, Superfund sites that may be pollutant pathways, as well as other discharging activities (such as Virginia Pollutant Discharge Elimination System permits) in the vicinity of the project. Without analyzing all of these sources, it is impossible to gain an accurate picture of the many potential pollutant exposure pathways a community may face. To be clear, we do not suggest that it would be the Board's purview to affect any of these other pollutant exposure pathways. Rather, the Board must consider, in the context of these other pollutant exposure pathways, the impact of additional air emissions from a proposed source on the local population.

One method that DEQ and the Board could utilize to assess potential human health impacts from a proposed activity is a risk assessment tool such as the EPA-approved Environmental Benefits Mapping and Analysis Program–Community Edition (BenMAP).[15] BenMAP is an open-source computer program that can be used to calculate the number and economic value of air pollution-related deaths and illnesses. For example, a BenMAP analysis can provide an estimate of the number of respiratory or cardiovascular hospital admissions, emergency room visits, workdays lost, and cases of acute or chronic bronchitis or exacerbation of asthma symptoms that will be caused by increased emissions from a particular facility or source. BenMAP can also provide an estimate of the total cost, in U.S. dollars, of those negative health impacts. Importantly, as a model, BenMAP is subject to multiple input decisions and assumptions by the user. For example, a meaningful BenMAP analysis would not set a threshold for impacts from pollutants that are considered non-threshold pollutants (such as fine particulate

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[13] *Friends of Buckingham*, 947 F.3d at 93.

[14] Yet, it is clear DEQ continues to misinterpret and misapply this binding ruling in its current site suitability analysis process. In the recent Lambert Compressor Station permitting analysis for site suitability, DEQ again relies on NAAQS to support its position regarding site suitability, stating: "Nothing in 1307E, any EJ authority or precedent commands or suggests that DEQ substitute or create location-specific air quality standards (for an EJ community) or otherwise." DEQ Response to Comments for the Lambert Compressor Station, p. 51, *available at*: https://townhall.virginia.gov/L/GetFile.cfm?File=Meeting\1\32635\Agenda_DEQ_32635_v4.pdf This statement clearly contradicts what Friends of Buckingham and other policies of the Commonwealth now require of DEQ and the Board. DEQ's legal obligation is to "individually consider the potential degree of injury to the local population independent of NAAQS and state emissions standards." *Friends of Buckingham*, 947 F.3d at 86. While NAAQS are intended to provide an "adequate margin of safety" as necessary to "protect the public health," they are not capable of contemplating all of the unique factors that might contribute to a community's vulnerability to particular criteria pollutants. 42 U.S.C. § 7409(b

[15] Environmental Protection Agency, *Environmental Benefits Mapping and Analysis Program – Community Edition,* https://www.epa.gov/benmap

matter)[16]. The use of this risk assessment tool will lead to better and more informed decision making as to the degree of injury an environmental justice community will face as the result a proposed activity.

IV. Ensuring No Disproportionate Impact

After analyzing the local population and the potential impacts that a population may face from the proposed activity, the site suitability analysis should then turn to whether such impacts would disproportionately impact environmental justice communities, including communities of color and fenceline communities.[17] In *Friends of Buckingham,* the Court noted the Commonwealth acknowledged that Virginia law requires the Board to consider the potential for disproportionate impacts to minority and low income communities.[18] Beyond the factors in Section 1307(E), the need for a disproportionate impact analysis is also implicated by the EJ Act's requirement that promoting environmental justice requires the fair treatment and meaningful involvement of every person.[19]

According to EPA guidance, in determining whether there is a disproportionate impact, DEQ "should attempt to estimate the proportion of impacts borne by low-income and/or minority populations within the area of a project's impact compared to the general population in and around the project, or the project's region of influence."[20] Other guidance from the White House Council on Environmental Quality ("CEQ") breaks down the disproportionate impact analysis into human health and environmental considerations. Relevant to the analysis of human health impacts, the guidance provides several factors that should be considered including: whether the health effects are significant or above generally accepted norms; whether the risk or rate of hazard exposure by an environmental justice population is significant and appreciably exceeds the risk or rate to the general population or other appropriate comparison group; and whether the health effects occur in an environmental justice population affected by cumulative or multiple adverse exposures from environmental hazards.[21] Relevant to considerations of environmental effects in evaluating disproportionate impacts, the analysis should consider: whether there will

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[16] *Friends of Buckingham*, 947 F.3d at 92 (noting that "any amount of PM 2.5 is harmful.").

[17] *See Friends of Buckingham*, 947 F.3d at 92 (noting that all parties to the case acknowledged that Virginia law requires the Board to consider the potential for disproportionate impacts to minority and low-income communities); *see also* Va. Code §§ 2.2-234-235.

[18] *Id.* While the Court in *Friends of Buckingham* referenced the Commonwealth Energy Policy (Va. Code § 67-102) and its requirement to consider the potential for disproportionate impacts to minority and low-income communities, the Court also relied on 1307(E). Therefore, recent statutory changes to the Commonwealth Energy Policy repealing Va. Code § 67-102 do not obviate the need to conduct an analysis of disproportionate impacts as part of the site suitability analysis. Likewise, the new statutory language (Va. Code § 67-101.1 continues to recognize the need to promote environmental justice.

[19] Va. Code § 2.2-234 (defining fair treatment as ""the equitable consideration of all people whereby no group of people bears a disproportionate share of any negative environmental consequence resulting from an industrial, governmental, or commercial operation, program, or policy.")

[20] EPA, *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses* § 5.2 (1998), *available at*: https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_epa0498.pdf

[21] CEQ, *Environmental Justice Guidance Under the National Environmental Policy Act*, App. A (Guidance for Federal Agencies on Key Terms in Executive Order 12898), at 26–27 (Dec. 1997), https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf.

be a significant impact on the natural or physical environment that significantly and adversely affects an environmental justice population; whether environmental effects are significant and may be having an adverse impact on environmental justice populations that appreciably exceeds those on the general population or other appropriate comparison group; and whether the environmental effects occur in an environmental justice population affected by cumulative or multiple adverse exposures from environmental hazards.

Developing a method, based on environmental justice best practices, to evaluate cumulative and disproportionate impacts to environmental justice communities including Tribal communities and evaluating site suitability is also a recommendation from the Environmental Justice Study ("EJ Study") conducted by Skeo Solutions, Inc. for DEQ.[22] The EJ Study included references to specific approaches DEQ should consider, such as EPA's social impact assessments required for certain federal projects under the National Environmental Policy Act ("NEPA") to thoroughly evaluate the potential adverse impacts of proposed facility siting, construction, and operation under three scenarios: (1) build, (2) build with modifications, and (3) no build. DEQ should also look to methodologies used by other states to determine whether there will be a cumulative impact. For example, Minnesota prohibits the issuance of air permits in environmental justice areas unless there has been a cumulative effects analysis that considers "cumulative levels and effects of past and current environmental pollution from all sources on the environment and residents of the geographic area . . ."[23] Likewise, New York requires an evaluation of disproportionate impacts by cumulative levels of pollutants for electric generating facilities.[24]

V. Increasing Effectiveness of Site Suitability Analysis

One stated goal of this NOIRA is to achieve increased effectiveness in the site suitability determination process. In order for this process to have any effect, DEQ and the Board must have the ability, informed by the outcome of the site suitability analysis, to take action on the permit in light of the outcomes of the analysis (to include modifying or denying a permit based thereon). As the Court in *Friends of Buckingham* required, the site suitability analysis for an environmental justice community must not rely blindly on ambient air standards.[25] Likewise, environmental justice "is not merely a box to be checked."[26] Therefore, it would follow that for site suitability in the context of environmental justice communities to have any effect, the Board must have the ability to take action based on the analysis required by the Virginia Air Pollution Control Law. This must include the ability for the Board to require changes to the proposed activity to reduce impacts and the ability to deny a permit where such impacts cannot be sufficiently reduced. Importantly, there is precedent for the Board denying an air pollution permit on site suitability grounds.[27] The site suitability regulations should provide clear guidance

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[22] Environmental Justice Study for Virginia DEQ (Oct. 2020) *available at*: https://www.deq.virginia.gov/home/showpublisheddocument/8624/637557216750470000

[23] Minn. Stat. Ann. § 116.07(4a)(a), https://www.revisor.mn.gov/statutes/cite/116.07.

[24] N.Y. Pub. Serv. Law § 168(2)(d), https://www.nysenate.gov/legislation/laws/PBS/168.

[25] *Friends of Buckingham*, 947 F.3d at 86.

[26] *Id.*

[27] *See* Air Pollution Control Board Decision for Dano Resources Recovery (Dec. 10, 1979) as discussed in "Dano Is Denied Permit in King George," Richmond Times Dispatch (Dec. 11, 1979) (noting that the Air Board's denial was "based on the fact that it [the plant] was unsuitable for the location" according to the

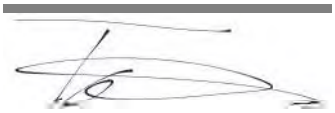
to permit applicants as to what information it must provide to DEQ and the Board as well as objective factors the Board must consider in evaluating impacts to EJ communities. Finally, the Board's final written findings must explain its reasoning in determining compliance with the site suitability requirements.[28]

VI. Conclusion

Thank you for the opportunity to provide these comments on the scope of issues DEQ and the Board must address in developing regulations to implement the site suitability requirements under Va. Code § 10.1-1307(E). We look forward to working with DEQ and other stakeholders to develop proposed regulations that comport with the requirements of *Friends of Buckingham* and protect our most vulnerable communities. Please contact Patrick if you have any questions or concerns regarding these comments at: PFanning@CBF.org or (304) 952-7496.

Sincerely,

Patrick J. Fanning
Virginia Staff Attorney



Taylor Lilley
Environmental Justice Staff Attorney

cc: The Honorable Matt Strickler, Secretary of Natural Resources
David Paylor, Director, Department of Environmental Quality
Margaret L, (Peggy) Sanner, Virginia Executive Director, CBF

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then Air Board Executive Director William Meyer) *available at*: https://www.dropbox.com/s/rq6qwe8i30yxbxn/Dano%20Air%20Board%2011%20Dec.%201979.pdf?dl=0

[28] Va. Code § 10.1-1322.01(P).

Commonwealth of Virginia

Sabasteanski, Karen <karen.sabasteanski@deq.virginia.gov>

regulations revision

1 message

Suzanne Keller <sjkeller.ma@gmail.com> Mon, Jun 7, 2021 at 2:39 PM
To: Karen.Sabasteanski@deq.virginia.gov

Suzanne J. Keller
1312 Amherst Ave
Richmond, Virginia 23227
June 7, 2021

Dear Ms. Sabasteanski,

I write today to comment on the Air Pollution Control Board review of the regulations 9VAC5-80 and 9VAC5-170.

First, I want to put in the record that I found out about this regulation review completely by serendipity as it was mentioned on a DEQ zoom call in March. I do not think there was adequate notification to concerned citizens about the review or notice about the convening of an advisory review panel to write the new regulation. Had I known about the panel, I certainly would have considered joining it. Because the issue of site suitability and environmental justice are so intertwined and the DEQ and the Air Board have been focused on these issues, as well as communication with the public, I ask that the review be completely re-opened with notice to concerned parties and an opportunity to participate in the panel.

As a participant in the opposition to the Buckingham Compressor Station (CS), the Chickahominy Power Plant and the Norfolk Naval Shipyard power plant, I believe that the Air Board regulation regarding site suitablilty should be robust, strong and reflect the requirements of § 10.1-1307 E. We are fortunate to have the 4th Circuit decision in Friends of Buckingham vs. Air Pollution Control Board to guide deliberation about this issue, for the Court spells out in great detail and with much clarity that the Board has a duty to determine the site suitability of facilities that apply for air permits.

When the DEQ relied on the special use permit (SUP) and site survey for the Buckingham CS I was struck by the lack of due diligence by DEQ to really assess the community surrounding the proposed site. The deference to the County SUP in this case and I suspect this occurs in most cases where a poor rural community or small town is asked by a major corporation to

give variances to its zoning, does not protect air quality or public health as required by the statute. The County has no expertise in air quality or environmental justice. Moreover, local zoning boards are hardly able to withstand the pressure, politics, and money that a major corporation uses to get its way. Local zoning boards should not be the final word on site suitability and as you know the 4th Circuit agrees. The Air Board must make its own determination based on the statute about the reasonableness of the proposed facility.

The broad duty of the Air Board to determine if a site is suitable is essential to pursuing the environmental justice goals of the Commonwealth. A local zoning board has no duty nor the expertise to consider cumulative burden of pollution, nuisances like odors and traffic, and health impacts of air pollution. The Air Board does have a duty to consider the health and safety and reasonableness of the proposed activity. The pending Lambert CS permit is a good example of the point I am making. The local zoning board approved a permit in the context of political clout and the financial incentives of the "good" corporate partner Mountain Valley Pipeline even though the proposed CS is within ½ a mile of the massive Transco stations 65 and 66. This is how environmental injustice is perpetuated.

The new regulation should be it abundantly clear to applicants that there will be greater scrutiny of any facility that will be located in proximity to environmental justice communities and other polluting facilities. As the 4th Circuit noted, the impact of air pollution to those in close proximity to the source of pollution has to be part of the determination as to site suitability. If the Commonwealth is serious about environmental justice it needs to make it clear to potential polluters that they can't just pick the poorest, most vulnerable communities to locate their facilities.

I do not think it would be helpful to just give polluters a checklist that would satisfy the requirements of 1307E. The revised application for an air permit submitted by ACP/Dominion and the application for the Lambert Compressor station illustrate what the applicants will do. They will hire consultants to do so-called health assessments and environmental justice assessments and just go forth and ask for a permit in spite of the findings. They will not change their plans or find a more suitable location. The Lambert CS completely ignored the findings of their environmental justice consultant and their toxicologist for hire report said nothing about the health of the people who actually live there. Regulations should be focused on how to protect the air quality in Virginia from polluting industries, regulations should not be written to make it easier, more convenient or less costly for these industries to pollute what is our birthright, clean air, clean water and clean earth.

The DEQ opines about § 10.1-1307 E in the notice of review: As applied to the review of permits, these criteria are very broad and may delve into areas beyond air quality law and science, including areas within the purview of local governments. I strongly disagree with this characterization of the statute. It is broad because frankly, as I mention above, the local

zoning boards and local governments do not have the technical expertise to make decisions that impact the air quality in the commonwealth as a whole. The new regulation should make it absolutely clear that the Air Board will consider the health, safety, reasonableness and suitability of a facility. The DEQ wants to limit the Air Board, I believe this will result in the degradation of air quality, quality of life and health of Virginians.

The DEQ says that it wants to revise the regulation to better protect public health and welfare, yet as noted above, the agency seems to want to narrow the scope of the Air Boards deliberations. I think the DEQ has blinders on. It's culture and practice is to facilitate pollution by issuing air permits even in the face of obvious problems with environmental justice and need. It acts as if the 4th Circuit decision in Buckingham is an inconvenience when it could be used a road map to substantively improve the regulation of air pollution in our state. I am submitting the decision as part of my public comment.

Please notify me if there is a public hearing on this regulation.

Sincerely,

Suzanne J. Keller

A_fourth circuit buckingham.pdf
150K

LUCK COMPANIES

BY ELECTRONIC MAIL: karen.sabasteanski@deq.virginia.gov

Karen G. Sabasteanski
Department of Environmental Quality
1111 East Main Street, Suite 1400
P.O. Box 1105, Richmond, VA 23218

Re: Comments on Notice of Intended Regulatory Action
Implementation of Site Suitability Requirements of Va. Code § 10.1-1307 E

Dear Ms. Sabasteanski:

Thank you for the opportunity to comment on this important regulatory proposal. The site suitability requirement found at Va. Code § 10.1-1307.E has been in place for quite some time. Although the Department of Environmental Quality (DEQ) previously issued guidance regarding how this provision would be implemented, that guidance has since been withdrawn. In light of questions that have been raised by stakeholders, and the decision by the Fourth Circuit Court of Appeals in the *Friends of Buckingham* case[1], decided in 2020, it is appropriate and necessary to provide clarity about how this provision applies in the air permitting context.

The following comments provide ideas, considerations and context for addressing site suitability. These comments are focused primarily on the implementation of site suitability in the air permitting context, but Section 10.1-1307.E also applies to the development of regulations, variances, and control programs.

1. Need for Regulatory Certainty

Regulatory certainty regarding the information needed to demonstrate site suitability is needed. As discussed in more detail below, local zoning decisions and established air emission standards should be the key components of determining site suitability. The criteria for site suitability should be concrete, objective, and well understood by both the public and regulated entities. Finally, the non-air quality component of the site suitability determination should be made early in the permitting process (i.e., through the required local government certification process).

2. Components of Site Suitability.

The site suitability provision identifies four components:

- The character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened to be caused;
- The social and economic value of the activity involved;

[1] *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F. 3d 68 (4th Cir. 2020).

- The suitability of the activity to the area in which it is located; and
- The scientific and economic practicality of reducing or eliminating the discharge resulting from such activity.

The *Friends of Buckingham* case only addressed the first and third of these components. The regulation must recognize that all four components are relevant. Additionally, how the four components relate to each other or are weighted will be an important part of the discussion (and was not addressed in the *Friends of Buckingham* decision).

The site suitability analysis must consider the social and economic value of the project in accordance with the second requirement of the statute. That is, evaluating whether and how the project contributes or supports the economic growth of the affected community through tax revenues, employment, etc. is an important part of the site suitability analysis. In addition, the analysis must take into account whether the project provides a valuable resource to the community, county, state, or the United States such as drinking water, wastewater service, waste disposal, recycling services, natural gas, electricity, transportation or agricultural products.

Finally, the regulation must recognize that the purpose of the site suitability provision – and the standard that applies – is to determine whether the activity involved and the regulations proposed to control it are *reasonable*. Va. Code 10.1-1307 E. According to the Merriam-Webster Dictionary, "reasonable" means not extreme or excessive, but moderate and fair. *See,* Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/reasonable. The reasonableness standard underscores the requirement to consider all four factors outlined in the statute.

3. Distinguishing Between Different Types of Facilities/Permits.

There are many different types of air permits, and a wide variety of facilities that are subject to air permitting requirements. Air permitting requirements also differ depending on whether a given area is in attainment or nonattainment status, with more stringent requirements applied in nonattainment areas. The site suitability provisions should allow for consideration of these differences among permits, areas and types of facilities. DEQ has the discretion to determine the appropriate analysis for different types of permits. For example, DEQ could determine that impacts associated with general permits or certain types of facilities are sufficiently minimal that no additional site suitability analysis is required, or site suitability is deemed satisfied.

More importantly, it is critical that the regulation make clear that it applies to new facilities, rather than to existing facilities. Existing facilities were already subject to the site suitability determination, which was previously made at the time the original permit was issued. The permittee relied on the permit and invested in constructing the facility. The operation is already in place, and thus it would not make sense, and likely would not be legally defensible, to revisit site suitability for existing facilities.

4. Reliance on Local Zoning Determination

DEQ historically applied site suitability in the air permitting context by considering compliance with local zoning. This is an important consideration, given the role of the host locality in identifying and delineating the areas impacted by a given project, conducting public outreach and understanding the compatibility of the proposed use in a given area. It makes sense that DEQ has historically focused on compliance with zoning requirements as a core component of the site suitability determination for air permits. The regulation should recognize the important role of local zoning in demonstrating site suitability.

5. Role of Air Emission Standards

The site suitability provisions found at Va. Code § 10.1-1307.E apply not only to permits, but also to the establishment of regulations and approval of variances and control programs. This provision has been in effect since the late 1960s. Accordingly, most if not all of Virginia's air regulations – including adoption of federal and state-specific air emission standards – were adopted while the site suitability provision was in effect. Considering site suitability both at the time the standards were developed as well as at the time of issuance of permits for new facilities makes sense and ensures regulatory consistency and certainty. It also suggests, as discussed above, that the site suitability analysis for individual permits should focus more on the other aspects of site suitability (the social and economic value of the activity involved; the suitability of the activity to the area in which it is located (i.e., zoning)) rather than the appropriate emissions standards for the activity.

Site suitability should not be an opportunity to revisit air emission standards or impose site-specific emission standards. Compliance with the National Ambient Air Quality Standards (NAAQS), EPA's Maximum Achievable Control Technology (MACT) standards and/or the Virginia State Ambient Air Concentrations (SAACs) (coupled with compliance with local zoning requirements) should be determinative of site suitability. The US EPA sets NAAQS for pollutants that are harmful to the public health and the environment with an adequate margin of safety.[2] That is, the margin of safety addresses uncertainties with regard to inconclusive science or hazards yet to be identified.[3] The standards are set to protect all human health, including "sensitive populations such as such as asthmatics, children, and the elderly."[4] It is also set after extensive review and based on available science.[5] In addition, the process to develop the NAAQS includes public participation (both through a public comment period and public hearings).[6] EPA's Environmental Appeals Board have acknowledged that compliance with the NAAQS is protective of environmental justice communities.[7]

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[2] https://www.epa.gov/naaqs; 42 U.S.C. §§ 7408(a); 7409(b).

[3] Roger O. McClellan, *Role of science and judgment in setting national ambient air quality standards: how low is low enough?*, Air Quality Atmosphere and Health (June 1, 2011), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3353112/.

[4] https://www.epa.gov/sciencematters/study-shows-low-levels-air-pollution-pose-risk-older-adults; *see also See id.* § 7409(d), § 7408.

[5] https://www.epa.gov/criteria-air-pollutants/process-reviewing-national-ambient-air-quality-standards.

[6] *Id.*

[7] *In re Shell Gulf of Mex. Inc.*, 15 E.A.D. 103, 156 (EAB 2010) ("In the context of an environmental justice analysis, compliance with the NAAQS is emblematic of achieving a level of public health protection that, based on the level

DEQ's air toxics program is also protective of all human health.[8] It integrates federal and state air toxics regulations and proposed projects that emit toxic pollutants are analyzed for health impacts.[9] The SAACs and exemption rates for toxics are based on Threshold Limit Values ("TLVs") which are established based on health factors with no consideration given to economic or technical feasibility.[10] The TLVs are established by members of the scientific community and are set at levels that "does not create an unreasonable risk of disease or injury."[11] Even though the exemption rates and SAACS are protective of human health, they are set at a fraction of the Threshold Limit Values.[12] Once the exemption rates are exceeded, an applicant has to model to demonstrate compliance with the SAACS.[13] If there is reason to believe that the SAACS will be exceeded, the emissions must be controlled to a level below the SAACS or acceptable to the Air Board.[14]

EPA also regulates hazardous air pollutants that pose an adverse risk to human health from source categories in two phases.[15] The first phase is technology based where EPA develops MACT standards based on emission levels achieved by the best-performing (best-controlled and lower-emitting) similar facilities.[16] Within eight years of setting the MACT standards, EPA has to assess the remaining health risks from each source category to determine whether the MACT standards protect the public health within an ample margin of safety.[17] Here, EPA assesses how effective the technology-based standards have been in reducing public health risks and determine whether more protective standards are required.[18] In addition, every eight years after EPA sets MACT standards, it must review and revise the standards taking into account improvements in air pollution control technology.[19]

These standards provide important safeguards for public health, and regulatory certainty both to the public and to regulated entities. The site suitability regulation should recognize the importance role of these standards in the air permitting process. Air emission standards cannot be determined on a case-by-case basis. This would undermine the air permitting program and the regulatory framework established by the Clean Air Act. Moreover, DEQ and the Air Board are also charged with establishing regulations and standards governing air emissions in Virginia. These regulations and standards are also subject to the site suitability provision found at Va.

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of protection afforded by a primary NAAQS, demonstrates that minority or low-income populations will not experience disproportionately high and adverse human health or environmental effects due to exposure to relevant criteria pollutants.")

[8] 9VAC5-60-210. C. (""Significant ambient air concentration" means the concentration of a toxic pollutant in the ambient air that if exceeded may have the potential to injure human health.")

[9] 9 VAC5-60-10 *et seq.*

[10] https://www.acgih.org/science/tlv-bei-guidelines/policies-procedures-presentations/

[11] *Id.*

[12] 9VAC5-60-200; 9VAC5-60-230.

[13] 9VAC5-60-250.

[14] 9VAC5-60-260.A.3.

[15] CAA Section 112(d); 40 CFR Part 63; https://www.epa.gov/stationary-sources-air-pollution/risk-and-technology-review-national-emissions-standards-hazardous.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

Code § 10.1-1307.E. Thus, application of the site suitability provision in the permitting context should not be an opportunity to revisit established standards that have already been assessed in accordance with the site suitability provisions.

Thank you for your consideration of these comments.

Respectfully,

Mark D. Williams
Environmental Manager

SOUTHERN ENVIRONMENTAL LAW CENTER

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July 9, 2021

Via email

Karen G. Sabasteanski
Department of Environmental Quality
P.O. Box 1105
Richmond, VA 23218
karen.sabasteanski@deq.virginia.gov

Re: Comments on NOIRA to Develop Parameters for Implementing Site Suitability Criteria

Dear Ms. Sabasteanski:

We appreciate the Department of Environmental Quality's ("DEQ") solicitation of public comments on DEQ's development of parameters for implementing the site suitability criteria of the State Air Pollution Control Law, Va. Code § 10.1-1307(E). Pursuant to the Notice of Intended Regulatory Action ("NOIRA") published in the Virginia Register on May 10, 2021, the Southern Environmental Law Center ("SELC") offers the following comments.

In recent years, SELC has engaged with DEQ and the State Air Pollution Control Board ("Board") on several permitting matters that involved the application of the site suitability requirements set forth in Va. Code § 10.1-1307(E). From 1987 through December 2008, DEQ and the Board operated under the Board's site suitability policy, under which "the Board would defer to locally elected officials with respect to local issues such as zoning and direct emphasis toward the Board's ability to consider air quality related issues."[1] That policy was ultimately rescinded and "since then, § 10.1-1307 E has been interpreted by the department and the board on a case-by-case basis."[2] In the NOIRA, the Board noted that "it would provide clarity for the regulated community and the public to set forth the parameters the board and agency will use to implement this criterion in the context of air permitting."[3]

We are heartened by DEQ's effort to consider new regulations "to provide greater detail as to how the requirements of § 10.1-1307 E are to be met."[4] In particular, in assessing site suitability, it is critical that DEQ and the Board consider the potential for disproportionately high and adverse impacts that a potential permittee's activities may have on communities of color and low-income communities. As the U.S. Court of Appeals for the Fourth Circuit acknowledged in

[1] Notice of Intended Regulatory Action (NOIRA) Agency Background Document at 3 (Sept. 25, 2020) ("*NOIRA Background Document*").
[2] *Id*.
[3] *Id*. at 1.
[4] *Id*.

Friends of Buckingham v. State Air Pollution Control Board, "[t]here is evidence that a disproportionate number of environmental hazards, polluting facilities, and other unwanted land uses are located in communities of color and low-income communities."[5] By formulating these regulations in a thoughtful way, DEQ has the opportunity to ensure that these environmental justice communities are adequately protected in the Commonwealth.

1. Any site suitability analysis must consider the potential for disproportionately high and adverse impacts on environmental justice communities.

As DEQ and the Board have recognized, environmental justice must be considered as part of any site suitability analysis. Whether an environmental justice community would face "disproportionately high and adverse human health or environmental effects"[6] from the construction or operation of a proposed facility bears on three of the site suitability factors that DEQ and the Board "shall consider": "1. The character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened to be caused;" "2. The social and economic value of the activity involved;" and "3. The suitability of the activity to the area in which it is located."[7] In *Friends of Buckingham*, DEQ and the Board acknowledged that when considering site suitability under Va. Code § 10.1-1307(E), they are "require[d] to consider the potential for disproportionate impacts to minority and low income communities."[8] However, in a recent response to public comments on a draft minor new source permit, DEQ appeared to bifurcate its assessment of impacts on environmental justice communities from its evaluation of site suitability, stating that "[i]ssues that include disproportionate impact in the comment are mixing environmental justice (discussed later) with the requirement to determine site suitability."[9] This bifurcated approach is inconsistent with the position taken by DEQ and the Board in *Friends of Buckingham* and with the Fourth Circuit's opinion in that case. Accordingly, regulations implementing Va. Code § 10.1-1307(E) should expressly provide that environmental justice be considered as part of the site suitability analysis.

Properly characterizing the local population that could be affected by a proposed activity is a crucial first step in analyzing site suitability. In *Friends of Buckingham*, the Court found that assessing the character of the local population is inherently linked with assessing the suitability of an activity to the site.[10] To do this, EPA's EJSCREEN tool can be a helpful starting point in analyzing local populations that may be affected by a proposed activity. However, EPA itself cautions that EJSCREEN is only intended to "highlight places that may be candidates for *further review, analysis or outreach* to support the agency's environmental justice work."[11] Therefore, to

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[5] 947 F.3d 68, 87 (4th Cir. 2020) (quoting Nicky Sheats, *Achieving Emissions Reductions for Environmental Justice Communities Through Climate Change Mitigation Policy*, 41 Wm. & Mary Envtl. L. & Pol'y Rev. 377, 382 (2017)).
[6] Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).
[7] Va. Code § 10.1-1307(E); 9 Va. Admin. Code § 5-170-170.
[8] 947 F.3d at 87 (quoting Brief of Respondents at 53).
[9] Mountain Valley Pipeline LLC, Lambert Compressor Station, Registration Number 21652, Article 6 Draft Permit: Response to Public Comments at 16 (June 18, 2021).
[10] 947 F.3d at 86.
[11] Limitations and Caveats in using EJSCREEN, Environmental Protection Agency, https://www.epa.gov/ejscreen/limitations-and-caveats-using-

properly and accurately characterize the local population, the use of EJSCREEN should be supplemented with additional "review, analysis, or outreach."[12]

Clearly incorporating environmental justice considerations into the site suitability analysis would also be consistent with two critical pieces of legislation enacted in 2020 that enshrined environmental justice in the Commonwealth's Code. SB 406, also known as the Virginia Environmental Justice Act ("VEJA"), defined "environmental justice" as "the fair treatment and meaningful involvement of every person, regardless of race, color, national origin, faith, disability, or income, in the development, implementation, and enforcement of environmental laws, regulations, and policies."[13] The VEJA also defines "meaningful involvement" as "the requirements that (i) affected and vulnerable community residents have access and opportunities to participate in the full cycle of the decision-making process about a proposed activity that will affect their environment or health and (ii) decision makers will seek out and consider such participation, allowing the views and perspectives of community residents to shape and influence the decision."[14] By supplementing the use of EJSCREEN with additional "review, analysis, or outreach" in the site suitability analysis as recommended above, DEQ can also help to ensure the meaningful involvement of affected environmental justice communities. In addition, the VEJA inserted a new section into Title 2.2 of the Virginia code, which declared "[i]t is the policy of the Commonwealth to promote environmental justice and ensure that it is carried out throughout the Commonwealth, with a focus on environmental justice communities and fenceline communities."[15] The second notable environmental justice bill, HB 1162, amended the section of the code specifically governing DEQ. First, HB 1162 inserted the term "environmental justice" into Va. Code § 10.1-1182, with a definition consistent with that in the VEJA. Second, HB 1162 amended DEQ's statement of policy, Va. Code § 10.1-1183, and made it an express DEQ policy "to further environmental justice."

2. Considering environmental justice requires comparing the potential impacts borne by environmental justice communities to those borne by the general population.

Ample federal guidance exists to inform regulations setting parameters for the consideration of environmental justice in assessing site suitability. The Environmental Protection Agency's ("EPA") 1998 guidance for addressing environmental justice under the National Environmental Policy Act ("NEPA") explains that an environmental justice analysis "should attempt to estimate the proportion of impacts borne by low-income and/or minority populations within the area of a project's impact compared to the general population in and around the project, or the project's region of influence."[16]

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ejscreen#:~:text=EJSCREEN%20cannot%20provide%20data%20on,complete%20picture%20of%20a%20location (emphasis added).

[12] *Id*.

[13] Va. Code § 2.2-234.

[14] *Id*.

[15] *Id*. § 2.2-235.

[16] EPA, Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses § 5.2 (1998), https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_epa0498.pdf ("*NEPA EJ Guidance*").

More specifically, the Council on Environmental Quality's ("CEQ") 1997 environmental justice guidance advises that when determining whether *human health* effects are disproportionately high and adverse, agencies consider the following three factors to the extent practicable:

(a) "whether the health effects, which may be measured in risks and rates, are significant (as employed by NEPA), or above generally accepted norms. Adverse health effects may include bodily impairment, infirmity, illness, or death; and
(b) whether the risk or rate of hazard exposure by a minority population, low-income population, or Indian tribe to an environmental hazard is significant (as employed by NEPA) and appreciably exceeds or is likely to appreciably exceed the risk or rate to the general population or other appropriate comparison group; and
(c) whether health effects occur in a minority population, low-income population, or Indian tribe affected by cumulative or multiple adverse exposures from environmental hazards."[17]

CEQ's guidance also advises that when determining whether *environmental* effects are disproportionately high and adverse, agencies consider the following three factors to the extent practicable:

(a) "whether there is or will be an impact on the natural or physical environment that significantly (as employed by NEPA) and adversely affects a minority population, low-income population, or Indian tribe. Such effects may include ecological, cultural, human health, economic, or social impacts on minority communities, low-income communities, or Indian tribes when those impacts are interrelated to impacts on the natural or physical environment; and
(b) whether environmental effects are significant (as employed by NEPA) and are or may be having an adverse impact on minority populations, low-income populations, or Indian tribes that appreciably exceeds or is likely to appreciably exceed those on the general population or other appropriate comparison group; and
(c) whether the environmental effects occur or would occur in a minority population, low-income population, or Indian tribe affected by cumulative or multiple adverse exposures from environmental hazards."[18]

In addition, EPA's 1998 NEPA EJ Guidance also "provide[s] an overview of some of the available tools and the types of analyses that may be useful for identifying and assessing disproportionately high and adverse effects," including locational/distributional tools, risk assessments, and socioeconomic analyses.[19] Furthermore, two EPA draft guidance documents

[17] CEQ, *Environmental Justice Guidance Under the National Environmental Policy Act*, App. A (Guidance for Federal Agencies on Key Terms in Executive Order 12898) at 26 (Dec. 1997), https://www.epa.gov/sites/production/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf.

[18] *Id*. at 26–27. Of course, even non-significant impacts can still cause disproportionate harm to EJ communities, and the Board should account for that reality in these regulations.

[19] *NEPA EJ Guidance* § 5.0.

issued in 2000, the "Draft Recipient Guidance" and "Draft Revised Investigation Guidance," describe steps and methods used in conducting adverse disparate impact analyses under Title VI of the Civil Rights Act.[20]

Other factors that may inform an agency's determination as to whether an effect is disproportionately high and adverse include "[c]ontext and intensity," "[s]ignificance," and "the distribution of beneficial and adverse impacts between [environmental justice] populations in the affected environment and the general population."[21] Even where a facility's impact on an environmental justice community appears to be identical to its impact on the general population, the impact on the environmental justice community may still be disproportionately high and adverse due to unique characteristics of the community, including ecological, aesthetic, historic, cultural, economic, social, or health factors that amplify the impact (e.g., unique exposure pathways, social determinants of health, or cultural practices).[22]

3. In determining "[t]he suitability of the activity to the area in which it is located," DEQ and the Board must consider cumulative impacts on environmental justice communities.

Federal guidance makes clear that an agency cannot meaningfully consider a facility's potential for a disproportionately high and adverse impacts on an environmental justice community without considering the facility's effects in combination with other environmental stressors affecting the community.[23] These other environmental stressors could include, *inter alia*, "point and nonpoint release sources," the "[p]resence of listed or highly ranked toxic pollutants with high exposure potential," "[m]ultiple exposure sources and/or paths for the same pollutant," "[h]istorical exposure sources and/or pathways," and "existing air pollution (in urban areas), lead poisoning, [or the] existence of abandoned toxic sites."[24]

EPA and federal interagency working groups have recognized that where a facility "is one of a number of similar sources in a geographic area, [t]hese facilities, together or in conjunction with background sources, may present a cumulative adverse disparate impact or may reflect a pattern of adverse disparate impact."[25] And as the Federal Interagency Working Group

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[20] EPA, Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs ("*Draft Recipient Guidance*") and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits ("*Draft Revised Investigation Guidance*"), 65 Fed. Reg. 39,650, 39,660–62, 39,676–82 (June 27, 2000).

[21] Fed. Interagency Working Grp. on Envtl. Just. & NEPA Comm., Promising Practices for EJ Methodologies in NEPA Reviews at 38, 39–40 (Mar. 2016), https://www.epa.gov/sites/production/files/2016-08/documents/nepa_promising_practices_document_2016.pdf ("*Promising Practices*").

[22] *Id*. at 39.

[23] *See NEPA EJ Guidance* § 2.2.2 ("EPA NEPA analyses must consider the cumulative effects on a community by addressing the full range of consequences of a proposed action as well as other environmental stresses which may be affecting the community.").

[24] *Id*.

[25] *Draft Revised Investigation Guidance*, 65 Fed. Reg. at 39,678; *see also Promising Practices* at 34 ("Additional factors related to an impact's intensity . . . that could lead to a finding of significance to minority populations and low-income populations in the affected environment, despite having no significant impact to the general population include: . . . 5) the impact's relation to other cumulatively significant impacts.").

on Environmental Justice has observed, "[f]actors that can potentially amplify an impact to minority populations and low-income populations in the affected environment include . . . [m]ultiple or cumulative impacts, e.g., exposure to several sources of pollutions or pollutants from single or multiple sources."[26]

Therefore, consideration of the potential for disproportionate impacts on environmental justice communities requires DEQ and the Board to "[d]etermine whether the activities of the permitted entity at issue, either alone *or in combination with other relevant sources*, may result in adverse impact."[27] To assess the significance of such cumulative adverse impacts on an environmental justice community, DEQ and the Board can "compare the cumulative effects of multiple actions with appropriate community, regional, state, or national goals, standards, etc."[28] CEQ guidance provides additional methods and tools for analyzing cumulative effects.[29]

4. In considering the potential for disproportionately high and adverse impacts on an environmental justice community, DEQ and the Board cannot rely solely on the fact that a facility would not cause or contribute to a violation of ambient air quality standards.

For the purpose of evaluating whether an environmental justice community would face disproportionately high and adverse human health or environmental effects from a proposed facility, it is insufficient for DEQ and the Board to rely exclusively on the facility's compliance with applicable ambient air quality standards, such as the National Ambient Air Quality Standards ("NAAQS"). The Fourth Circuit expressly rejected this approach in *Friends of Buckingham*, observing that "[e]ven if all pollutants within the county remain below state and national air quality standards, the Board failed to grapple with the likelihood that those living closest to the Compressor Station—an overwhelming minority population according to the Friends of Buckingham Survey—will be affected more than those living in other parts of the same county."[30] The court held that "the Board's failure to consider the disproportionate impact on those closest to the Compressor Station resulted in a flawed analysis."[31]

As federal guidance explains, whether a proposed facility would allow an area to comply with air quality standards is distinct from whether it would have a disproportionately high and adverse effect on environmental justice communities.[32] This makes scientific and practical sense. Many pollutants, including ozone and fine particulate matter, cause adverse health effects even at

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[26] *Promising Practices* at 43.
[27] *Draft Revised Investigation Guidance*, 65 Fed. Reg. at 39,679 (emphasis added).
[28] *NEPA EJ Guidance* § 2.2.2.
[29] CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* (Jan. 1997), https://ceq.doe.gov/publications/cumulative_effects.html.
[30] 947 F.3d at 91–92.
[31] *Id*. at 92.
[32] *See NEPA EJ Guidance* § 3.2.2 (explaining that even harms that are not "significant" in the NEPA context may disproportionately or severely harm environmental justice communities); *see also Promising Practices* at 38 ("A finding of no significant impacts to the general population is insufficient (on its own) to base a determination that there are no disproportionately high and adverse impacts to minority populations and low-income populations"); *id*. at 39.

levels below NAAQS.[33] A contrary approach would require consideration of disproportionate impacts only for facilities that would contribute to a violation of air quality standards, and thus could not lawfully be built—an absurd result.

5. DEQ and the Board have an independent responsibility to evaluate site suitability that cannot be delegated to local governing authorities.

Under the Board's old Site Suitability Policy, it was the Board's policy that "the suitability of a proposed facility to a specific location be determined by the local governing body, except as to questions involving the air quality regulatory authority of the [Board]."[34] However, in 2008, the policy "was ultimately rescinded."[35]

Existing regulations provide that a permittee's compliance with local zoning ordinances and regulations "does not relieve the board of its duty under . . . § 10.1-1307 E of the Virginia Air Pollution Control Law to independently consider relevant facts and circumstances."[36] Citing that provision, the Fourth Circuit held in *Friends of Buckingham* that "it is improper to rely upon a [Special Use Permit] as a substitute for an independent determination of site suitability under section 10.1-1307(E)."[37] New regulations should make clear that while a local government's decision may inform the site suitability determination, DEQ and the Board must independently determine site suitability under section 10.1-1307(E). Such an independent determination of site suitability is also consistent with DEQ's new obligation to "further environmental justice."[38]

* * *

SELC welcomes DEQ's efforts to establish parameters to implement the site suitability criteria in the context of air permitting. Amending the applicable regulations to expressly incorporate consideration of the potential for disproportionately high and adverse impacts on communities of color and low-income communities will promote environmental justice in the Commonwealth and will provide greater consistency, clarity, and effectiveness within the site suitability determination process.

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[33] *See Friends of Buckingham*, 947 F.3d at 92 (observing that "any amount of PM2.5 in the system is harmful"); *Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 360 (D.C. Cir. 2002) (recognizing the "lack of a threshold concentration below which [particulate matter is] known to be harmless"); NAAQS for Particulate Matter, 78 Fed. Reg. 3086, 3098 (Jan. 15, 2013) (recognizing that there is "no population threshold, below which it can be concluded with confidence that $PM_{2.5}$-related effects do not occur.").

[34] State Air Pollution Control Board, Suitability Policy (adopted Sep. 11, 1987).

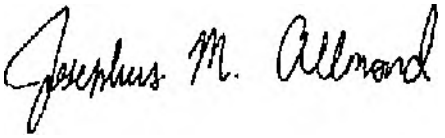
[35] *NOIRA Background Document* at 3.

[36] 9 Va. Admin. Code § 5-80-1230.

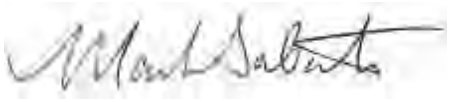
[37] 947 F.3d at 93.

[38] Va. Code § 10.1-1183.

Sincerely,



Josephus Allmond
Associate Attorney



Mark Sabath
Senior Attorney

The following is one of 143 identical emails sponsored by the Sierra Club.

Commonwealth of Virginia

Sabasteanski, Karen <karen.sabasteanski@deq.virginia.gov>

Comment on the Size Suitability for the Permitting Process (Code of Virginia Section ? 10.1-1307 E)

1 message

Paige Wesselink (paige.wesselink@sierraclub.org) Sent You a Personal Message Wed, Jul 7, 2021 at 3:27 PM
<automail@knowwho.com>
To: karen.sabasteanski@deq.virginia.gov

Dear Karen Sabasteanski,

I write today to submit a comment regarding DEQ?s site-suitability. I ask that this process be improved by incorporating additional information related to what groups are impacted by a project, how a project will hurt the public health of the surrounding community, and if the decision-making process is transparent, inclusive, and accessible to the public.

Specifically, I ask that amendments to the Code of Virginia ? 10.1-1307 E to include more specific criteria on what constitutes a suitable site should include, in addition to compliance with ambient air quality standards and water quality standards, parameters for site suitability should include an evaluation of physical site, a comprehensive evaluation of population density and demographic data (including any available health data) nearby a site, and an evaluation of the surrounding zoning and land use.

Regulations implementing this Code provision should broadly do the following:

- Address insufficiencies in Air Board permitting cited by 4th Circuit in Friends of Buckingham including:
  - Mandate for an in-depth assessment of the disproportionate impacts placed on frontline communities from facilities
  - to individually consider the potential degree of injury to the local population independent of National Ambient Air Quality Standards and state emission standards
- Provide for meaningful public involvement in the site review process
- Insure that every permitting decision ?promotes environmental justice? as required by VA EJ Act
- Make clear that social and economic benefits of the proposed activity do not inherently override public health impacts of the activity
- Review relevant health data (asthma prevalence, cancer prevalence, etc.) and determine whether there?s disproportionate health burdens among the demographic groups that reside within the specified radius
- Develop comprehensive research on other polluting sources in the area
- Determine whether any health burdens disproportionately experienced by frontline communities could be exacerbated by the proposed facility
- Determine whether and what mitigation measures are necessary to prevent degradation of air quality and water quality adjacent to proposed sites

Sincerely,

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July 8, 2021

Karen G. Sabasteanski
Department of Environmental Quality
1111 East Main Street, Suite 1400
P.O. Box 1105, Richmond, VA 23218

Re: Comments on Notice of Intended Regulatory Action
Implementation of Site Suitability Requirements of Va. Code § 10.1-1307 E

Dear Ms. Sabasteanski:

On behalf of the Virginia Asphalt Association (VAA) and Virginia's paving industry, thank you for the opportunity to comment on this important regulatory proposal. VAA represents over 20 producer companies in Virginia that manufacture asphalt concrete materials in addition to nearly 100 companies that work with or support these producers. The asphalt materials are used for both public and private projects that move people, goods, and services across the commonwealth. Association members contribute more than a billion dollars annually to the Virginia economy and employ tens of thousands of Virginians. Our members operate nearly 100 asphalt plants located in urban and rural settings. Many of these plants have existed on the same site for decades and some of these plants have had communities grown up around them. VAA members put a priority on environmental compliance and are subject to air permitting requirements. Regulatory certainty and efficient permitting timelines are of critical importance to VAA members.

The following comments provide ideas, considerations, and context for addressing site suitability in the air permitting context. While these comments are focused primarily on air permitting, Va. Code § 10.1-1307.E also applies to the development of regulations, variances, and control programs.

1. Need for Regulatory Certainty

Regulatory certainty regarding the information needed to demonstrate site suitability is needed. As discussed in more detail below, local zoning decisions and established air emission standards should be the key components of determining site suitability. The

criteria for site suitability should be concrete, objective, and well understood by both the public and regulated entities. Finally, the non-air quality component of the site suitability determination should be made early in the permitting process (i.e., through the required local government certification process).

2. Components of Site Suitability.

The site suitability provision identifies four components:

- The character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened to be caused;
- The social and economic value of the activity involved;
- The suitability of the activity to the area in which it is located; and
- The scientific and economic practicality of reducing or eliminating the discharge resulting from such activity.

The *Friends of Buckingham* case only addressed the first and third of these components. The regulation must recognize that all four components are relevant. Additionally, how the four components relate to each other or are weighted will be an important part of the discussion (and was not addressed in the *Friends of Buckingham* decision).

The site suitability analysis must consider the social and economic value of the project in accordance with the second requirement of the statute. That is, evaluating whether and how the project contributes or supports the economic growth of the affected community through tax revenues, employment, etc., is an important part of the site suitability analysis. In addition, the analysis must take into account whether the project provides a valuable resource to the community, county, state, or the United States, such as drinking water, wastewater service, waste disposal, recycling services, natural gas, electricity, transportation, or agricultural products.

Finally, the regulation must recognize that the purpose of the site suitability provision – and the standard that applies – is to determine whether the activity involved and the regulations proposed to control it are *reasonable*. Va. Code 10.1-1307 E. According to the Merriam-Webster Dictionary, "reasonable" means not extreme or excessive, but moderate and fair. *See,* Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/reasonable. The reasonableness standard underscores the requirement to consider all four factors outlined in the statute.

3. Distinguishing Between Different Types of Facilities/Permits.

There are many different types of air permits and a wide variety of facilities that are subject to air permitting requirements. Air permitting requirements also differ depending on whether a given area is in attainment or nonattainment status, with more stringent requirements applied in nonattainment areas. The site suitability provisions should allow for consideration of these differences among permits, areas and types of facilities.

DEQ has the discretion to determine the appropriate analysis for different types of permits. For example, DEQ could determine that impacts associated with general permits or certain types of facilities are sufficiently minimal that no additional site suitability analysis is required, or site suitability is deemed satisfied.

More importantly, it is critical that the regulation make clear that it applies to new facilities rather than to existing facilities. Existing facilities were already subject to the site suitability determination, which was previously made at the time the original permit was issued. The permittee relied on the permit and invested in constructing the facility. The operation is already in place, and thus it would not make sense, and likely would not be legally defensible, to revisit site suitability for existing facilities.

4. Reliance on Local Zoning Determination

DEQ historically applied site suitability in the air permitting context by considering compliance with local zoning. This is an important consideration, given the role of the host locality in identifying and delineating the areas impacted by a given project, conducting public outreach and understanding the compatibility of the proposed use in a given area. It makes sense that DEQ has historically focused on compliance with zoning requirements as a core component of the site suitability determination for air permits. The regulation should recognize the important role of local zoning in demonstrating site suitability.

5. Role of Air Emission Standards

The site suitability provisions found at Va. Code § 10.1-1307.E apply not only to permits, but also to the establishment of regulations and approval of variances and control programs. This provision has been in effect since the late 1960s. Accordingly, most if not all of Virginia's air regulations – including adoption of federal and state-specific air emission standards – were adopted while the site suitability provision was in effect. Considering site suitability both at the time the standards were developed as well as at the time of issuance of permits for new facilities makes sense and ensures regulatory consistency and certainty. It also suggests, as discussed above, that the site suitability analysis for individual permits should focus more on the other aspects of site suitability (the social and economic value of the activity involved; the suitability of the activity to the area in which it is located (i.e., zoning)) rather than the appropriate emissions standards for the activity.

Site suitability should not be an opportunity to revisit air emission standards or impose site-specific emission standards. Compliance with the National Ambient Air Quality Standards (NAAQS), EPA's Maximum Achievable Control Technology (MACT) standards and/or the Virginia State Ambient Air Concentrations (SAACs) (coupled with compliance with local zoning requirements) should be determinative of site suitability. The US EPA sets NAAQS for pollutants that are harmful to the public health and the

environment with an adequate margin of safety.[1] That is, the margin of safety addresses uncertainties with regard to inconclusive science or hazards yet to be identified.[2] The standards are set to protect all human health, including "sensitive populations such as such as asthmatics, children, and the elderly."[3] It is also set after extensive review and based on available science.[4] In addition, the process to develop the NAAQS includes public participation (both through a public comment period and public hearings).[5] EPA's Environmental Appeals Board have acknowledged that compliance with the NAAQS is protective of environmental justice communities.[6]

DEQ's air toxics program is also protective of all human health.[7] It integrates federal and state air toxics regulations and proposed projects that emit toxic pollutants are analyzed for health impacts.[8] The SAACs and exemption rates for toxics are based on Threshold Limit Values ("TLVs") which are established based on health factors with no consideration given to economic or technical feasibility.[9] The TLVs are established by members of the scientific community and are set at levels that "does not create an unreasonable risk of disease or injury."[10] Even though the exemption rates and SAACS are protective of human health, they are set at a fraction of the Threshold Limit Values.[11] Once the exemption rates are exceeded, an applicant has to model to demonstrate compliance with the SAACS.[12] If there is reason to believe that the SAACS will be exceeded, the emissions must be controlled to a level below the SAACS or acceptable to the Air Board.[13]

EPA also regulates hazardous air pollutants that pose an adverse risk to human health from source categories in two phases.[14] The first phase is technology based where EPA develops MACT standards based on emission levels achieved by the best-

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[1] https://www.epa.gov/naaqs; 42 U.S.C. §§ 7408(a); 7409(b).
[2] Roger O. McClellan, *Role of science and judgment in setting national ambient air quality standards: how low is low enough?*, Air Quality Atmosphere and Health (June 1, 2011), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3353112/.
[3] https://www.epa.gov/sciencematters/study-shows-low-levels-air-pollution-pose-risk-older-adults; *see also See id.* § 7409(d), § 7408.
[4] https://www.epa.gov/criteria-air-pollutants/process-reviewing-national-ambient-air-quality-standards.
[5] *Id.*
[6] *In re Shell Gulf of Mex. Inc.*, 15 E.A.D. 103, 156 (EAB 2010) ("In the context of an environmental justice analysis, compliance with the NAAQS is emblematic of achieving a level of public health protection that, based on the level of protection afforded by a primary NAAQS, demonstrates that minority or low-income populations will not experience disproportionately high and adverse human health or environmental effects due to exposure to relevant criteria pollutants.")
[7] 9VAC5-60-210. C. (""Significant ambient air concentration" means the concentration of a toxic pollutant in the ambient air that if exceeded may have the potential to injure human health.")
[8] 9 VAC5-60-10 *et seq.*
[9] https://www.acgih.org/science/tlv-bei-guidelines/policies-procedures-presentations/
[10] *Id.*
[11] 9VAC5-60-200; 9VAC5-60-230.
[12] 9VAC5-60-250.
[13] 9VAC5-60-260.A.3.
[14] CAA Section 112(d); 40 CFR Part 63; https://www.epa.gov/stationary-sources-air-pollution/risk-and-technology-review-national-emissions-standards-hazardous.

performing (best-controlled and lower-emitting) similar facilities.[15] Within eight years of setting the MACT standards, EPA has to assess the remaining health risks from each source category to determine whether the MACT standards protect the public health within an ample margin of safety.[16] Here, EPA assesses how effective the technology-based standards have been in reducing public health risks and determine whether more protective standards are required.[17] In addition, every eight years after EPA sets MACT standards, it must review and revise the standards taking into account improvements in air pollution control technology.[18]

These standards provide important safeguards for public health, and regulatory certainty both to the public and to regulated entities. The site suitability regulation should recognize the importance role of these standards in the air permitting process. Air emission standards cannot be determined on a case-by-case basis. This would undermine the air permitting program and the regulatory framework established by the Clean Air Act. Moreover, DEQ and the Air Board are also charged with establishing regulations and standards governing air emissions in Virginia. These regulations and standards are also subject to the site suitability provision found at Va. Code § 10.1-1307.E. Thus, application of the site suitability provision in the permitting context should not be an opportunity to revisit established standards that have already been assessed in accordance with the site suitability provisions.

Thank you for your consideration of these comments.

Sincerely,

Trenton M. Clark, P.E.
President

[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*

VIRGINIA ENVIRONMENTAL JUSTICE COLLABORATIVE

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July 9, 2021

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Via email to: karen.sabasteanski@deq.virginia.gov

Re: Comments on Notice of Intended Regulatory Action (NOIRA) to develop parameters for implementing site suitability[1] criteria of state law for permits and variances (Rev. G20) under Code of Virginia § 10.1-1307 E of the State Air Pollution Control Law

Dear Ms. Sabasteanski:

The Virginia Environmental Justice Collaborative respectfully submits the following comments regarding the development of regulations to implement the siting criteria under Va. Code § 10.1-1307 E of the State Air Pollution Control Law.

The Virginia Environmental Justice Collaborative (VEJC) was created in 2015 to fill the need for statewide coordination to support Virginia organizations addressing environmental justice issues. The VEJC has adopted the following definition of *environmental justice*:

> The whole of community must be taken into account when defining "environment" in "environmental justice." Therefore, "environmental" refers to the *natural, cultural, social, economic and political* components of a community.[2]

The VEJC was founded by the Southeast CARE Coalition, Appalachian Voices, the Federal Policy Office of WE ACT for Environmental Justice, and New Virginia Majority, and we continue to grow, currently with forty members strong. Our members come from diverse backgrounds including community organizing, academia, policy, and faith-based activism. It is our commitment to consciously remain *governed by* and *deeply rooted in* the environmental justice communities that we serve and represent.

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[1] The use of the term "site suitability" in the Action Title of the NOIRA is inappropriate, since site suitability is only one of the four distinct siting criteria that the State Air Pollution Control Board must address when "making regulations and in approving variances, control programs, or permits" under Va. Code § 10.1-1307 E. Instead, we use the term "siting criteria" instead of "site suitability" in this letter to collectively describe the four distinct criteria set forth in Va. Code § 10.1-1307 E that the regulations should address.

[2] Va. Envtl. Justice Collaborative, About, https://www.vaejc.com/about (last visited July 9, 2021).

Accordingly, it is our sincere hope that the Department of Environmental Quality (DEQ) and State Air Pollution Control Board (Board) will be guided by the following comments in the development and adoption of siting criteria regulations under Va. Code § 10.1-1307 E.

Background

Virginia Code § 10.1-1307 E sets forth four distinct siting criteria the State Air Pollution Control Board must consider when issuing permits or variances:

> "The Board in making regulations and in approving variances, control programs, or permits … shall consider facts and circumstances relevant to the reasonableness of the activity involved and the regulations proposed to control it, including:
>
> 1. The character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened to be caused;
>
> 2. The social and economic value of the activity involved;
>
> 3. The suitability of the activity to the area in which it is located; and
>
> 4. The scientific and economic practicality of reducing or eliminating the discharge resulting from such activity."[3]

The Board and DEQ announced that they intend to consider amending the Board's regulations "to provide greater detail as to how the requirements of § 10.1-1307 E are to be met, with the goal of greater consistency, clarity, and effectiveness of the site suitability determination process."[4]

While clarity and consistency of application are admirable goals, in order to effectively implement the requirements of § 10.1-1307 E, the Board must (1) consider *all four* elements listed under 10.1-1307 E together, and (2) comply with additional legal authorities, including the the Virginia Environmental Justice Act of 2020 and the binding precedent established by the U.S. Court of Appeals for the Fourth Circuit in *Friends of Buckingham v. State Air Pollution Control Board* (hereafter, "*Buckingham")*.[5]

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[3] Va. Code § 10.1-1307 E.

[4] Va. Dept. of Envtl. Quality, Notice of Intended Regulatory Action (NOIRA) Agency Background Document 1 (April 8, 2021), *available at* https://townhall.virginia.gov/L/GetFile.cfm?File=1\5624\9094\AgencyStatement_DEQ_9094_v4.pdf.

[5] *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68 (4th Cir. 2020) (hereafter "*Buckingham"*).

The *Buckingham* case provides both an example of the Board's flawed application of § 10.1-1307 E and some guidance on what the Board must do to properly implement this provision in the future. In this case, the Court vacated the Board's issuance of a Clean Air Act minor source permit to Atlantic Coast Pipeline, LLC to construct and operate a compressor station in the historic Freedmen community of Union Hill in Buckingham County, Virginia.[6] The Court found, among other things, that "(1) [the Board] failed to make any findings regarding the character of the local population at Union Hill, in the face of conflicting evidence; (2) it failed to individually consider the potential degree of injury to the local population independent of NAAQS and state emission standards; and (3) DEQ's final permit analysis, ostensibly adopted by the Board, relied on evidence in the record that was incomplete or discounted by subsequent evidence."[7]

Shortly after the Fourth Circuit decided the *Buckingham* case, the Virginia General Assembly adopted the Virginia Environmental Justice Act. The Act declared for the first time that it is the policy of the Commonwealth "to promote environmental justice and ensure that it is carried out throughout the Commonwealth, with a focus on environmental justice communities and fenceline communities."[8] *Environmental justice* is defined as "the fair treatment and meaningful involvement of every person, regardless of race, color, national origin, income, faith, or disability, regarding the development, implementation, or enforcement of any environmental law, regulation, or policy."[9] *Meaningful involvement* is defined as "the requirements that (i) affected and vulnerable community residents have access and opportunities to participate in the full cycle of the decision-making process about a proposed activity that will affect their environment or health and (ii) decision makers will seek out and consider such participation, allowing the views and perspectives of community residents to shape and influence the decision."[10] The Act defines *environmental justice community* as "any low-income community or community of color," and it defines *fenceline community* as "an area that contains all or part of a low-income community or community of color and that presents an increased health risk to its residents due to its proximity to a major source of pollution."[11]

In addition, the VEJC has been working with environmental justice communities, local leaders, policy experts and advocates, and policymakers to create an all-of government understanding of *cumulative impacts*. Minority, lower-income, and rural communities historically have been burdened by new or expanded polluting activities on a repeated basis, resulting in disproportionate adverse health impacts. In 2021, the VEJC advocated for the adoption of the following definition of *cumulative impact* in Virginia law:

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[6] *Buckingham, 947 F.3 at* 86.
[7] *Buckingham, 947 F.3 at* 86.
[8] Va. Acts Chs. 1212, 1257 (2020).
[9] Va. Code § 2.2-234.
[10] Va. Code § 2.2-234
[11] Va. Code § 2.2-234.

> Cumulative impact means the impact on human health or the environment that results from the incremental impact of a covered agency action when added to the effects of other past, present, and reasonably foreseeable future actions, regardless of what agency or person undertakes such other actions. "Cumulative impact" can result from individually minor but collectively significant actions taking place over a period of time.[12]

In the absence of agency regulations and guidance for considering these combined health and environmental impacts, the environmental permitting process will perpetuate inequity and injustice in the Commonwealth.[13]

Comments

Regulations implementing Va. Code § 10.1-1307 E should broadly do the following: (A) address the flaws in the Board's interpretation of § 10.1-1307 E as found by the Fourth Circuit in the *Buckingham* decision; (B) clarify the Board's duty to make independent findings regarding each of the four elements of § 10.1-1307 E; and (C) incorporate the requirements of the Virginia Environmental Justice Act in the Board's consideration of permit applications.

A. Correcting the Board's Flawed Interpretation of § 10.1-1307 E

Compliance with the *Buckingham* precedent requires the Board, in implementing § 10.1-1307 E, to *at minimum*:

1. Make a finding as to the character of the local population, even if there is conflicting evidence in the record. The Board should determine an appropriate radius of potential impacts caused by the proposed activity, and using the best available data, determine whether the community within the impact zone of the proposed activity is either an *environmental justice community* (hereafter, "EJ community") or a *fenceline community* under the Virginia Environmental Justice Act.

2. Determine the potential impacts upon the health of the local population, without regard to NAAQS compliance (which are less specific to the local population). In short, the Board should determine an appropriate radius of potential impacts caused by the proposed activity and characterize the relative vulnerability of the local population (e.g., is the potential health impact disproportional?), using baseline health data and baseline air quality data. This may require DEQ or other state agencies to monitor and establish such baseline data.

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[12] *See* H.B. 2074 (2021), *available at* https://lis.virginia.gov/cgi-bin/legp604.exe?211+ful+HB2074+pdf.
[13] *See* David Kay, et al., What is a Cumulative Impact Assessment and Why Does It Matter? (Cornell University 2010), *available at* https://ecommons.cornell.edu/handle/1813/56078.

3. Rely on the best available evidence when making the required findings under § 10.1-1307.

1. Make a finding as to the character of the local population

When considering a draft regulation or permit application, the Board must reasonably identify the local population that will be affected. This identification should be guided by the potential reach of the relevant impacts. For example, when considering a permit application for an activity that will produce particulate matter emissions, the Board should determine a radius, informed by prevailing winds and other relevant factors specific to the pollutant, to determine an appropriate geographic unit of study.

The selection of an appropriate geographic unity of study is of utmost importance. Using a unit that is too large can misrepresent the likely impacts on particular communities by diluting the presence of vulnerable populations relative to a larger unit (such as Census tract,[14] County, or State). The Federal Interagency Working Group on Environmental Justice cautions that minority and low-income populations "may reside in tightly clustered communities, rather than being evenly distributed throughout the general population. Selecting a geographic unit of analysis (e.g., county, state, or region) without sufficient justification may portray minority [and low income] population percentages inaccurately by *artificially diluting their representation* within the selected unit of analysis."[15] At the same time, choosing a geographic unit that is too small may simply leave out communities that will be impacted by the proposed activity.

Warning that certain populations may not be fully accounted for using Census data, the Working Group advises that "[t]o sufficiently identify small concentrations (i.e., pockets) of minority populations, agencies may wish to supplement Census data with local demographic data. Local demographic data and information (including data provided by the community and Tribes) can improve an agency's decision-making process."[16]

A good example of local demographic data is the door-to-door demographic survey conducted by the Friends of Buckingham organization.[17] If adequate Census data are not available (e.g., the data are too old, or do not cover an appropriate geographic unit), the Board should require the permit applicant to conduct or fund a door-to-door survey. If there are conflicting presentations of demographic data or conflicting proposals for the appropriate geographic unit, the Board must make a reasonable decision supported by substantial evidence.[18]

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[14] Census tracts are a grouping of smaller units, Census blocks.
[15] Fed. Interagency Working Grp. on Envtl. Justice & NEPA Comm., Promising Practices for EJ Methodologies in NEPA Reviews 21, 26 (2016), *available at* https://www.epa.gov/sites/production/files/2016-08/documents/nepa_promising_practices_document_2016.pdf (emphasis added).
[16] *Id.* at 21.
[17] *Buckingham, 947 F.3 at* 86.
[18] *Buckingham, 947 F.3 at* 90.

After choosing an appropriate radius, the Board must examine relevant demographic characteristics of the population living there. The research group Mapping for Environmental Justice recommends tracking socioeconomic indicators, such as poverty, race, employment rates, education, housing burden, and English language fluency, as well as population sensitivities such as the rates of asthma, heart disease, and low birth weight.[19]

The Board should use these indicators in order to make a determination of the character of the local population. In other words, the Board must conduct a reasoned analysis and determine whether there is an environmental justice population present.[20]

2. Determine the potential degree of injury to the health of the local population

Once the Board has determined the appropriate geographic radius and the character of the local population (whether or not an EJ community is present), it must determine the potential degree of injury the proposed activity may have on that population. To do this, the Board should analyze the best available data for (1) baseline pollution burden indicators, and (2) determine the incremental impact, and/or cumulative impacts—without reliance on NAAQS.

We recommend establishing baseline data for exposures to relevant air pollutants (including sulfur dioxide, nitrogen oxides, particulate matter, lead, ozone, carbon monoxide, VOCs) as well as the prevalence of other sources of potential exposure.[21] Mapping for Environmental Justice has combined and weighted population characteristics and pollution burden indicators to create a map of the Commonwealth showing the relative environmental vulnerability and burdens across all Virginia Census tracts,[22] which may be a useful tool in the Board's analysis. The Board should also determine the locations of facilities used by sensitive populations within the radius (schools, hospitals, housing for disabled or elderly persons, low-income housing for families) relative to the proposed activity. By analyzing baseline pollution burden indicators, a picture emerges of the relative health or vulnerability of the affected community.

Next, the Board must determine whether the projected emissions from the proposed activity will degrade air quality both within the appropriate radius and in areas adjacent to that radius where identified sensitive populations may routinely travel. Based on the best available data, the Board should identify the potential health effects caused by exposure to the types of projected emissions from the proposed activity (e.g., cancers, respiratory illness, birth defects).

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[19] *See* Mapping for Environmental Justice, How to Read Our Map, https://mappingforej.berkeley.edu/about-our-map/ (last visited July 9, 2021).
[20] *Buckingham, 947 F.3 at* 87-88.
[21] Mapping for Environmental Justice divides these indicators into "Exposures" and "Environmental Effects." Mapping for Environmental Justice, How to Read Our Map, https://mappingforej.berkeley.edu/about-our-map/ (last visited July 9, 2021).
[22] Mapping for Environmental Justice, Virginia, https://mappingforej.berkeley.edu/virginia/ (last visited July 9, 2021).

At the same time, there may be mitigation measures available to prevent degradation of air quality in the relevant geographic unit. The Board should analyze whether mitigation measures are available and their relative efficacy. It should be noted that under Virginia law the best available control technology (BACT) is always required.[23]

If degradation of air quality cannot be prevented, the Board must determine the effects additional air pollutants are likely to have on the health of the local population. In other words, what are the cumulative impacts, taking into account all pollution presently affecting the local population, the future pollution caused by the proposed activity, other reasonably foreseeable pollution additions, and their compounding effects when combined? The Board should analyze and consider these effects, keeping in mind that cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

When an EJ community is identified, the Board's determination of the potential degree of injury to the local population must include a determination whether the impact of the proposed activity would be disproportionate. In making this determination, the Board cannot rely on data supporting continued compliance with the National Ambient Air Quality Standards (NAAQS). As stated emphatically by the Fourth Circuit, all parties to the case agreed that "factors outlined in § 10.1-1307(E)(3) – 'require[s] the Board to consider the potential for disproportionate impacts to minority and low income communities."[24] Moreover, the Court emphatically rejected the idea that NAAQS compliance is evidence that there will not be disproportionate impacts, holding that

> "Even if all pollutants within the county remain below state and national air quality standards, the Board failed to grapple with the likelihood that those living closest to the Compressor Station -- an overwhelmingly minority population according to the Friends of Buckingham Survey -- will be affected more than those living in other parts of the same county. The Board rejected the idea of disproportionate impact on the basis that air quality standards were met. But environmental justice is not merely a box to be checked, and the Board's failure to consider the disproportionate impact on those closest to the Compressor Station resulted in a flawed analysis."[25]

3. **Rely on the best available evidence when making the required findings under § 10.1-1307 E**

The *Buckingham* decision makes it very clear that agencies like the Board have a duty to make decisions based on the best evidence available. As for guidance, the Court opines that reliance on a "single-page" site evaluation that ignores the presence of residences within one mile of the

[23] *Buckingham, 947 F.3 at* 75 (citing 9 Va. Admin. Code § 5-50-260(B)).
[24] *Buckingham, 947 F.3 at* 87 (internal citations omitted).
[25] *Buckingham, 947 F.3 at* 91-92.

proposed project is "woefully inadequate."[26] The Court also makes plain that relying on a locality's special use permit is not "a substitute for an independent determination of site suitability under section 10.1–1307(E)" and that "blindly relying on ambient air standards is not a sufficiently searching analysis of air quality standards for an EJ community."[27]

B. <u>Make independent findings regarding each of the four siting criteria of § 10.1-1307 E</u>

As stated above, Va. Code § 10.1-1307 E sets forth *four* distinct siting criteria that the Board must address when "making regulations and in approving variances, control programs, or permits . . . ." Below we set out elements that should be included in the regulations to ensure the Board has sufficient information to make independent[28] findings that support a determination of "the reasonableness of the activity involved and the regulations proposed to control it," by using the four siting criteria set forth in Va. Code § 10.1-1307 E.

1. **Require the permit applicant to provide detailed information** to the Board that addresses the four discrete elements the Board must consider when issuing permits. This information should include:

    - Demographic data (e.g., race, national origin, poverty status, disability status) of those living in close proximity to the proposed activity;

    - Health data such as the incidence of diseases related to air pollution (e.g., asthma, chronic obstructive pulmonary disease, chronic bronchitis, pneumonia and heart disease)[29] experienced by demographic groups that reside in close proximity to the proposed activity;

    - Health effects of air toxics anticipated to be released by the proposed activity;

    - Maps showing the location of sensitive land uses in close proximity to the proposed activity such as schools, playgrounds, housing used by populations more vulnerable to the harmful effects of air toxics, etc.

    - Maps showing the location of natural features in close proximity to the proposed facility such as wetlands and floodplains, habitat for endangered species or other important wildlife, earthquake faults, etc.

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[26] *Buckingham, 947 F.3 at* 92-93.
[27] *Buckingham, 947 F.3 at* 93.
[28] "We remind the Board of its obligation to make independent findings and not rely on the findings of local zoning officials. '. . .[I]t is improper to rely upon a SUP as a substitute for an independent determination of site suitability under section 10.1–1307(E). *See* 9 Va. Admin. Code § 5-80-1230 "[C]ompliance [with zoning ordinances] does not relieve the board of its duty under ... § 10.1-1307[(]E[)] ... to independently consider relevant facts and circumstances.'" *Buckingham, 947 F.3 at* 93.
[29] *Buckingham, 947 F.3 at* 86.

- Maps showing the location of major and minor sources of air pollution in close proximity to the proposed facility;

- Maps showing the plumes where air toxics discharged by the proposed activity are likely to travel;

- The number of jobs projected by the proposed activity and plans for recruiting applicants who live in close proximity to the proposed facility;

- The economic benefits that will accrue to the host community by the proposed activity; and

- The proposed air pollution controls that the applicant intends to use, the cost of installing those controls, and any more stringent controls that the applicant considered and rejected.

2. **Make the information provided by the applicant available to the public** by posting it on the Board's (or DEQ's) website and providing copies to local public libraries near the proposed activity.

3. **Establish a public comment period** of at least 45 days on the materials submitted by the applicant and, if necessary, hold a public hearing in the host community of the proposed activity in the evening or on a weekend to adduce additional comments on those materials. If a public hearing is scheduled, require the applicant to produce a fact sheet that summarizes the proposed activity (up to 2 pages in length) in English and at least one foreign language widely used by persons living in close proximity to the proposed activity.

4. **Make findings of fact** for each of the four siting criteria set forth in Va. Code § 10.1-1307 E when making decisions under this Code provision, based on the information supplied by the applicant and the comments received during the comment period and/or public hearing.

5. **Explain in writing how the Board weighed the four siting criteria** set forth in Va. Code § 10.1-1307 E when issuing decisions under this Code provision. Further, the regulation should clarify that no single criteria will always prevail over the remaining three criteria.[30]

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[30] *See, Posey v. Commonwealth*, 123 Va. 551, 553, 96 S.E. 771, 771 (1918) ("It is one of the fundamental rules of construction of statutes that the intention of the Legislature is to be gathered from a view of the whole and every part of the statute taken and compared together, giving to every word and every part of the statute, if possible, its due effect and meaning, and to the words used their ordinary and popular meaning, unless it plainly appears that they were used in some other sense. If the intention of the Legislature can be thus discovered, it is not permissible to add to or subtract from the words used in the statute.") (internal citations omitted).

C. Comply with the Virginia Environmental Justice Act

When exercising any of its powers and duties, the Board must comply with the Virginia Environmental Justice Act, which established the policy of Virginia "to promote environmental justice and ensure that it is carried out throughout the Commonwealth, with a focus on environmental justice communities and fenceline communities."[31] As the Fourth Circuit observed in its *Buckingham* decision, "[E]nvironmental justice is not merely a box to be checked . . . ."[32] Instead, the Board is required to conduct a rigorous environmental justice analysis ". . . to determine whether a project will have a disproportionately adverse effect on minority and low income populations."[33]

Many of the recommendations made above would assist the Board in conducting the required rigorous environmental justice analysis. We highlight the following as what we would expect the proposed regulations to cover in order to ensure that analysis is conducted by the Board:

- Accurately identify the affected population (i.e., through both Census data and on-the-ground information like door-to-door surveys) and commit to more rigorous protection of all vulnerable or overburdened populations across the Commonwealth.

- Ensure "fair treatment" by considering whether any group of people are disproportionately impacted by adverse environmental consequences resulting from the proposed activity. The Board must make an appropriate assessment of the reasonableness of the activity if such consequences cannot not be completely avoided or mitigated.

- Provide for "meaningful involvement" in the site review process by disseminating to the public easily understandable information on the proposal, holding public comment periods that are open for a minimum of 45 days, holding public hearings in the host community of the proposed activity in the evening or on a weekend when appropriate, and taking other proactive steps to ensure the affected community has a voice in the decision-making process. Meaningful involvement should also include practices that respect and consider the community's cultural beliefs and practices, prioritize language accessibility, and accommodate the needs of low-income workers, communities of color, and fenceline communities.

- When an environmental justice or fenceline community is in close proximity to the proposed activity, analyze all impacts upon that community—including cumulative

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[31] Va. Code § 2-235.
[32] *Buckingham, 947 F.3 at* 92.
[33] *Buckingham, 947 F.3 at* 87 (citing *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th Cir. 2003)).

impacts[34]—to which the proposed regulations, variances, control programs, or permits may contribute.

- Make the findings for each of the four siting criteria listed in Va. Code § 10.1-1307 E, and deny any proposed regulations, variances, control programs, or permits that would cause or contribute to any adverse disproportionate or cumulative impact if those impacts cannot be completely avoided or mitigated; and

- Utilize the review process to involve and educate municipal officials, offices, the public, and the regulated community about cumulative impact in the local areas under review.

Conclusion

For the reasons outlined above, the VEJC strongly recommends that the Department and the Board, in developing siting criteria under Va. Code § 10.1-1307 E (1) comply with the precedent outlined in the Fourth Circuit's *Buckingham* decision, (2) make independent findings regarding each of the four elements of § 10.1-1307 E, and (3) fully incorporate environmental justice—the policy of the Commonwealth—into any final regulation.

The VEJC appreciates the opportunity to provide comments on this pending regulatory action.

Sincerely,

Queen Zakia Shabazz, Coordinator
Virginia Environmental Justice Collaborative
4809 Old Warwick Road
Richmond, VA 23224
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qshabazz@vaejc.org

[34] *See* N.J. Dept. of Envtl. Prot., Strategies for Addressing Cumulative Impacts in Environmental Justice Communities (Mar. 2009), *available at* https://www.state.nj.us/dep/ej/docs/ejac_impacts_report200903.pdf.

WILLIAMS MULLEN

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July 9, 2021

Via Electronic Mail at karen.sabasteanski@deq.virginia.gov

Ms. Karen G. Sabasteanski
Department of Environmental Quality
1111 East Main Street, Suite 1400
P.O. Box 1105
Richmond, VA 23218

Re: Comments on Notice of Intended Regulatory Action (NOIRA)
Site Suitability Requirements (Va. Code § 10.1-1307(E))

Dear Ms. Sabasteanski:

On behalf of the Virginia Manufacturers Association (VMA), please find the enclosed comments on the above-referenced NOIRA. It is a significant issue of importance to VMA's membership. We appreciate your consideration of VMA's comments.

Please feel free to contact Brett Vassey (804-709-1322) or me should you have any questions.

Very Truly Yours,

Liz Williamson

Liz Williamson

Attachment

cc: Mr. Brett A. Vassey, President and CEO, VMA *(via email)*

Virginia Manufacturers Association
Comments on the State Air Pollution Control Board
Site Suitability NOIRA

Virginia Manufacturers Association (VMA) submits these comments concerning the Notice of Intended Regulatory Action (NOIRA) for your consideration.

I. The Virginia Manufacturers Association.

VMA's membership includes more than 6,000 manufacturers across the Commonwealth. Our members employ over 230,000 individuals, contribute $47 billion to the gross state product, and account for over 80% of the state's goods exports to the global economy. VMA and its members strongly support the fair treatment of all people, regardless of race, color, national origin, or income, in the development, implementation, and enforcement of environmental laws.

Our members are active participants in Air Board rulemaking and permitting processes. Members hold and comply with air permits for their facilities across the Commonwealth. This requires regular engagement with the Virginia Department for Environmental Quality (DEQ) on permit compliance, inspections, and reporting.

VMA has been tracking the efforts of the State Air Pollution Control Board (Air Board) Committee on Public Engagement, including discussions concerning site suitability. We would appreciate your consideration of our perspectives on this rulemaking.

II. Background.

In the Section entitled "Further Powers and Duties of the [Air] Board," the Virginia Code provides that:

> The Board in making regulations and in approving variances, control programs, or permits, and the courts in granting injunctive relief under the provisions of this chapter, shall consider facts and circumstances relevant to the reasonableness of the activity involved and the regulations proposed to control it, including:
>
> 1. The character and degree of injury to, or interference with, safety, health, or the reasonable use of property which is caused or threatened to be caused;
> 2. The social and economic value of the activity involved;
> *3. The suitability of the activity to the area in which it is located*; and
> 4. The scientific and economic practicality of reducing or eliminating the discharge resulting from such activity.

Va. Code § 10.1–1307(E)(3) (emphasis added). The plain language of this statute charges the Air Board to consider: (1) the facts and circumstances relevant to the reasonableness of the activity involved; and (2) the regulations proposed to control it. As part of this equation, the statute delineates four specific aspects for consideration, one of which is site suitability.

It is important to recognize, as an initial consideration, that site suitability is one of four parts of the overall analysis of the reasonableness of the activity and proposed regulation. Although this rulemaking focuses on just one part of Air Board's powers and duties, site suitability must not be determined without weighing all the factors in the analysis of the permit, variance, regulation, or program.

Site suitability under Section 1307(E) has been in place since 1966. From 1987-2008, the Air Board followed a policy in which it deferred to local planning and zoning officials in relation to site suitability. From 2008 to present, the Board reviewed site suitability on a case-by-case basis. Overall, since its inclusion in 1966, the Air Board has generally recognized local zoning designations and deferred to government officials and planners throughout the history of the statute. At no time has the Board commandeered the responsibility for land use planning and zoning for the Commonwealth.

II. Comments regarding Site Suitability.

1. The Site Suitability criteria should defer to the zoning requirements and expertise of local governmental authorities.

Local zoning requirements and the analysis of local land use planning authorities should be presumed to be appropriate and reasonable due to the comprehensive analysis involved, including analyzing statutory health, welfare, safety, and convenience considerations, engaging experienced land use professionals and governmental officials, and considering written and oral public comment. The site suitability criteria should be drafted to provide this deference.

The General Assembly declares its intent for localities to "improve the public health, safety, convenience, and welfare of their citizens" by land use planning for the future development of communities. Va. Code § 15.2-220. Chapter 22 of the Virginia Code is dedicated to the framework for localities to engage in this endeavor. Article 7 addresses site suitability considerations in detail. Va. Code § 15.2-2280 *et seq.* Among the twelve purposes of zoning ordinances, localities must consider community welfare and safety needs as well as "protection of the natural environment." Va. Code § 15.2-2283.

Zoning ordinances must also comply with statutory site suitability considerations:

> Zoning ordinances and districts shall be drawn and applied with reasonable consideration for the existing use and character of property, the comprehensive plan, *the suitability of property for various uses*, the trends of growth or change, the current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies, the transportation requirements of the community, the requirements for airports, housing, schools, parks, playgrounds, recreation areas and other public services, the conservation of natural resources, the preservation of flood plains, the protection of life and property from impounding structure failures, the preservation of agricultural and forest land, the conservation of properties and their values and the encouragement of the most appropriate use of land throughout the locality.

Va. Code § 15.2-2284 (emphasis added). Among the considerations of the locality is the suitability of the property for the intended uses. The locality must notify the public of zoning ordinances, maps and amendments and provide at least one public hearing on the matter. Va. Code § 15.2-2285(C). Localities are also charged with hearing special exceptions and variances from zoning ordinances, which also require public notice and a hearing. Va. Code § 15.2-2310.

It is not the intent of the General Assembly to have DEQ or the Air Board unravel the local zoning process. Rather, the General Assembly specifically defers to the locality to confirm that land use criteria are met in Section 15.2-2200 *et seq.* as a part of the air permitting process. Va. Code § 10.1-1321.1. Air Board activism would render these local processes meaningless and conflict with Virginia's statutory framework. Any site suitability criteria to be considered by the Air Board must not usurp local zoning regulations and the comprehensive analyses of local authorities.

The plain intent of the General Assembly, as evidenced in Chapter 22 (Planning, Subdivision of Land and Zoning), is for the bulk of the site suitability analysis to be performed on the local level. Planning personnel at the local level are in the best position to evaluate the property at issue in relation to its surrounding areas and potential use. Furthermore, the local zoning process requires public notice and comment on the suitability of a parcel for a particular use. Should a landowner need a special use permit, that process also provides an opportunity for public engagement.

As required by statute, the Air Board should consider the analysis of local authorities when considering the implications of the regulation, permit, program, or variance. While it is true that the Air Board has a separate statutory duty to consider site suitability, local determinations should be overturned only in situations in which there is clear violation of zoning or land use statutes, which also include public engagement opportunities. We would encourage the Air Board to engage in a cooperative dialogue with the local governing body to resolve any outstanding issues.

2. Neither DEQ nor the Air Board should be placed in the position of a land use planner for the Commonwealth.

The State Air Pollution Control Board's function is to make regulations, develop emissions programs, maintain National Ambient Air Quality Standards (NAAQS), issue certain air permits, and collect fees for the administration of these rules and enforcement of them. 9 VAC 5 (Agency Summary). DEQ's purpose involves consolidating the functions of the Department of Air Pollution Control, State Water Control Board, Department of Waste Management, and the Council on the Environment (advisory agency). DEQ's scope does not include land use planning and decision-making. 9 VAC 15 (Agency Summary). Neither the Board nor DEQ are charged with making land use determinations that would dictate which areas of the Commonwealth may site industrial and commercial facilities or new projects, in the absence of a NAAQS nonattainment designation.

The Fourth Circuit decision in *Friends of Buckingham v. State Air Pollution Control Board*, 947 F.3d 68 (2020) affirms that the Air Board must consider suitability of the activity to the area. *Id.* at 87. However, the major flaw the court identifies in that permitting action is the Board's final written statement when making the permitting decision, which "provides scant analysis" and fails to identify the "myriad studies and comments presented to the Board throughout the permitting process." *Id.* We believe the Board can discharge its site suitability statutory duties in Section 1307(E), while refraining from infringing on the responsibilities of local governments. The Air Board can resolve the concerns identified in *Buckingham* by considering public comments on site suitability in addition to the zoning and land use decisions by localities. Based on that information, the Board can provide a robust written narrative that lists the evidence considered, DEQ analysis, and a reasoned explanation that supports the Board's ultimate conclusions. This narrative would document the Board's findings and fulfill the requirements of Section 1307(E) in its final written statement.

3. This rulemaking should focus exclusively on whether clarification of 9 VAC 5-170-170 (Considerations for approval actions) is needed.

The General Assembly identified site suitability, among other criteria, for the Air Board to consider when deciding whether to approve a pending regulation, permitting action, variance, or program. Consequently, the relevant regulation at issue here is 9 VAC 5-170-170, which mimics the statutory language in Virginia Code § 10.1–1307(E)(3). The focus of that regulation is "[c]onsiderations for approval actions." 9 VAC 5-170-170. Further clarification of Subsection 3 ("[t]he suitability of the activity to the area in which it is located)," would be the most appropriate place to make a regulatory change. 9 VAC 5-170-170(3).

The NOIRA also lists 9 VAC 5-80 (Permits for Stationary Sources) as a possible candidate for amendment. Amending this section is not consistent with the purpose of Section 10.1–1307(E)(3). The statute does not envision the addition of new site suitability requirements to the DEQ permitting process. The statute simply requires site suitability as a consideration in an approval decision.

Parties looking to build a new "greenfield" source or modify a major source must already obtain the required land use approvals, coordinate with localities, and site the project in an appropriately zoned area. Va. Code § 10.1-1321.1(A).[1] DEQ's permit application regulations already incorporate this statutory requirement in multiple places in 9 VAC 5-80 for each permit type.[2] The permit package to the Air Board contains the locality approvals/zoning information, along with any oral or written public comments to inform the Board's decision. As a result, the Air Board has the background it needs to discharge its statutory duty to consider site suitability in the approval process. No change to the permitting process via revision of 9 VAC 5-80 is needed or authorized by statute.

4. Site suitability criteria should exclude existing source permits.

The focus of this rulemaking effort should be exclusively on new facilities to be sited in the Commonwealth. Furthermore, controversial permitting activities of late have involved the siting of new sources of air emissions. Narrowing the focus of this rulemaking to new source siting would address those concerns. Many existing source facilities have been located in the same area for decades.

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[1] The Virginia Code contains permit application requirements that already directly engage localities. No further change is needed. The requirements state: "No application for a permit for a new or major modified stationary air pollution source shall be considered complete unless the applicant has provided the Director with notification from the governing body of the county, city, or town in which the source is to be located that the location and operation of the source are consistent with all ordinances adopted pursuant to Chapter 22 (§ 15.2-2200 et seq.) of Title 15.2." Va. Code § 10.1-1321.1(A).

[2] *See* 9 VAC 5-80-1160; 9 VAC 5-80-1450; 9 VAC 5-80-1773; 9 VAC 5-80-2060.

The Air Board and local zoning officials fulfilled their statutory obligations to consider relevant statutory factors when the facility air permit was originally issued. Additionally, major sources under Prevention of Significant Deterioration (PSD)/New Source Review (NSR) were required to undertake a comprehensive air emissions analysis that involves the installation of expensive, state-of-the-art air control devices for compliance with Best Available Control Technology or Lowest Achievable Emission Rate requirements. This analysis also requires that a source undertake air quality modeling at the fenceline to ensure air quality is protected if the project goes forward. For that reason, it is not necessary to revisit this assessment. Existing source siting must be grandfathered.

As of June 26, 2021, DEQ lists 342 active permitting actions. Most are existing source permit applications that seek minor amendments, renewals, and modifications. Only 18 of the 342 permitting activities are applications for new major source permits (Title V source or combined Title V/VI source). It would be inefficient, costly, and burdensome for DEQ and/or the Air Board to vet site suitability requirements for existing source permitting activities. DEQ has limited resources, and therefore permitting processes for existing facilities, such as Title V renewals, are already prolonged due to these constraints.

In addition, cost is a significant concern for existing sources. Fully compliant, existing sources provide revenue and employment opportunities to the local community. If the Air Board or DEQ rejects a project based on siting at an existing source, then the owner's only other option is to build a replacement new source, possibly out of state. These costs, job losses, and loss of local tax revenue weigh heavily against restricting the ability of an existing source to make modifications. Moreover, encouraging greenfield development in lieu of utilizing existing infrastructure cuts against current Virginia policy.[3]

The sizeable impacts to the Virginia economy and its economic competitiveness must be considered. In addition, the cost to small businesses that must obtain air permits should be considered. If additional siting requirements are added, such as signage, additional permitting notices, and extensive public outreach, these costs will burden small businesses that are struggling to rebound post-COVID19. Cost impacts on the regulated community must be considered and factored into the Board's analysis.

Existing sources should be able to conduct facility modifications or simply renew an existing source permit as long as the source meets federal and state air quality and emissions requirements. Permit modifications often involve air quality improvements, such as replacing older emissions units with lower emitting units. DEQ frequently uses existing source renewals and modifications as

[3] The Virginia DEQ website articulates the policy to encourage development that utilizes existing infrastructure, which "reduces development of undisturbed open land." *See* https://www.deq.virginia.gov/land-waste/land-remediation/brownfields (visited July 9, 2021).

opportunities to improve air quality by adding new compliance assurance mechanisms (monitors/testing requirements). Site suitability should not hinder or delay existing source permitting actions.

5. Current air regulations protect sensitive communities in proximity to a facility.

The Clean Air Act requires permitting authorities to protect air quality for all communities, including sensitive populations. National Ambient Air Quality Standards or NAAQS ensure the Commonwealth's air quality is protective of public health. Standards to reduce and control Hazardous Air Pollutant (HAPs) under Clean Air Act, Section 112 prohibit the emission of unsafe levels of air toxics into the atmosphere. A number of other emissions standards apply to facilities such as New Source Performance Standards, the Acid Rain Program, open burning regulations, federal HAPs requirements,[4] and Virginia air toxics regulation requirements. DEQ maintains a network of air monitors to ensure that air quality in the Commonwealth is continually measured and maintained. These statutes and regulations result in a complex and protective framework to safeguard Virginians from harmful air pollutants in the ambient air. DEQ uses these data and information provided with the permit application to assess the impacts of the project on the local community.

For example, the Consumer Energy Alliance recently reported federal data from 1990 to 2017, in which emissions of key air pollutants and greenhouse gases in Virginia have declined as follows:

- 68 percent reduction in carbon monoxide (CO)
- 51 percent reduction in ammonia (NH3)
- 61 percent reduction in nitrogen oxides (NOx)
- 30 percent reduction in coarse particulate matter (PM10)
- 35 percent reduction in fine particulate matter (PM2.5)
- 89 percent reduction in sulfur dioxide (SO2)
- 60 percent reduction in volatile organic compounds (VOCs)

This reduction in air emissions has been accomplished while the Virginia gross domestic product grew 252% and the population grew 36%.[5]

The Board and DEQ must afford current health-based environmental standards the appropriate weight, given the protective nature and considerations involved when setting the air quality thresholds. To promulgate a NAAQS, EPA must identify the air quality level that protects the public health with an "adequate margin of safety." Clean Air Act, Section 109(b)(1); *see Whitman v. Am.*

[4] Section 112 of the Clean Air Act contains air toxics standards called National Emission Standards for Hazardous Air Pollutants or NESHAPs.

[5] Consumer Energy Alliance, Virginia Emissions Analysis, October 2019.

Trucking Ass'ns, 531 U.S. 457, 471 (2001). Costs are not considered. *Whitman*, 531 U.S. at 471.

EPA develops NAAQS through an integrated scientific assessment and separate risk assessment. Clean Air Act, §§ 108-109. NAAQS are designed to protect public health and the environment. EPA follows the Clean Air Act legislative history as a guide. Congress provided in relation to Section 109 that a primary standard is to be set at "the maximum permissible ambient air level . . . which will protect the health of any [sensitive] group of the population . . ." S. Rep. No. 91–1196, 91st Cong., 2d Sess. 10 (1970) (cited by EPA (84 Fed. Reg. 24094 (Apr. 30, 2020)) in the review of the particulate matter NAAQS). Further, Section 109(d) of the Clean Air Act requires EPA to review, and if necessary, revise the NAAQS every five years.

The Clean Air Act's NAAQS program is purposely developed to protect all populations, including sensitive individuals and communities. In fact, if the NAAQS does not also protect sensitive communities, then it violates the Clean Air Act. *Whitman*, 531 U.S. at 472-76. A NAAQS is set at a level in which there is no adverse effect on vulnerable populations. *Am. Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998). EPA has also shown particular sensitivity to at-risk populations in NAAQS review processes, such as ensuring that air quality monitoring data is not averaged in such a way as to mathematically erase disproportionate impacts on minority communities. *See, e.g.,* 71 Fed. Reg. 61144, 61166 (Oct. 17, 2006) (discussion of air quality data during review of PM NAAQS). EPA is taking obvious measures to identify and protect the air quality in surrounding communities. *See* 73 Fed. Reg. 66964, 66975 (Nov. 12, 2008) (discussing the analysis of lead impacts on sensitive populations that EPA identified as having low socioeconomic status in the Lead NAAQS review).

The process to obtain major permits incorporates NAAQS and other protective emissions requirements in the form of pre-permitting modeling, emissions calculations, and then by setting emissions limits and incorporating testing requirements to ensure compliance. For major projects, impacts to ambient air are modeled for comparison to the NAAQS standards at the site itself. For example, as part of the Prevention of Significant Deterioration or PSD major modification permitting process,[6] the U.S. Navy Norfolk Naval Shipyard (NNSY) undertook dispersion modeling of air quality in accordance with NAAQS to ensure there was no disproportionate adverse impact to any resident of the local community surrounding the Shipyard. *See* State Air Pollution Control Board, Meeting Minibook for December 3, 2020. Such an analysis satisfies the site-specific air quality analysis requirements articulated in *Friends of Buckingham v. State Air Pollution Control Board*, 947 F.3d 68 (2020). NNSY's modeling analyzed the emissions risk to the specific communities living near the project. *Cf. id.* at 91-92.

[6] NNSY is an existing stationary source. During the time of the PSD modification permit application process, it held a Title V permit and a minor NSR permit.

Site suitability determinations are not a substitute for substantive emission standards that have been developed using scientific study over many years. Rather, site suitability considerations add context to an air permitting decision. Current statutory site suitability requirements mandate a much different type of analysis from localities than developing an emissions standard with a numeric threshold, backed by science. In addition, site suitability determinations should not be premised on lower emissions values that have no regulatory or scientific basis or context. To do so would lead to arbitrary and capricious results that depart from any scientific basis and harm the economic viability of permittees and threaten the jobs of area residents as well as tax revenue of state and local governments.

Current state air regulations ensure that public outreach occurs for at-risk communities as part of many permitting activities and all major permitting activities. Any Air Board activism with regard to site suitability determinations should only apply to major new sources. We support outreach so that communities can engage in the process and concerns can be appropriately addressed in the permitting process.

Further, if the Air Board were to review an existing permit or modification of an existing permit through the lens of site suitability, there should be a high level review of all prior permit determinations and all related planning and zoning regulations. The Board should then hold itself to the highest standards of ethics and conduct to ensure it makes an impartial decision based upon the evidence.

III. Conclusion.

To summarize, VMA requests your consideration of the following five key points that are essential to the regulated community:

1. Any new site suitability criteria must defer to local government land use, planning, and zoning decisions.

2. Neither DEQ nor the Air Board should be placed in the position of a land use planner for the Commonwealth.

3. The sole focus of this rulemaking should be on whether it is necessary to clarify 9 VAC 5-170-170 (Considerations for approval actions) in reference to site suitability and weigh it appropriately as one of four criteria that the Board considers in approvals.

4. Any new site suitability criteria should pertain to major greenfield permitting projects only because no siting has occurred yet.

5. Existing federal and state air permitting requirements protect sensitive communities close to a facility, which is confirmed by site-specific modeling analyses conducted for new and modified source PSD permitting.

VMA appreciates your consideration of our comments on site suitability. We look forward to continued engagement in this process and invite any questions concerning these comments or our perspectives.

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804/649-8471

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Virginia Chapter

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Members of the Air Pollution Control Board
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Richmond, VA 23218

RE: Permits for Stationary Sources [9 VAC 5-80]

July 9, 2021

Members of the Air Pollution Control Board,

We write on behalf of local governments to submit comments solicited by the Air Pollution Control Board (the Board) Notice of Intended Regulatory Action [9 VAC 5 – 80] to develop parameters for implementing site suitability criteria/factors of state law for permits and variances.

As representatives of the local government community, we support the proposal to develop parameters for the Board and the Department of Environmental Quality to use for air permitting. We ask that this be done in a manner that respects existing local authority. Planning and land use are two of local government's most important functions and localities must retain control of local land use decisions. We request that the Air Pollution Control Board as you consider developing site suitability parameters respect local land use and comprehensive plans. We also request a meeting with the appropriate representatives of the Board to discuss this matter.

Thank you for your consideration.

Michelle Gowdy
Executive Director
Virginia Municipal League

Earl W. Anderson
President
Virginia Chapter of the American Planning Association

VIRGINIA OIL AND GAS ASSOCIATION

VIA ELECTRONIC MAIL: karen.sabasteanski@deq.virginia.gov
Karen G. Sabasteanski
Department of Environmental Quality
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Re: Notice of Intended Regulatory Action:
Implementation of Site Suitability Requirements of Va. Code § 10.1-1307.E.

Dear Ms. Sabasteanski:

The Virginia Oil and Gas Association (VOGA) appreciates the opportunity to comment on this regulatory proposal. Given that the Department of Environmental Quality's (DEQ) previously issued guidance on site suitability determinations has been withdrawn, VOGA believes this is an area much in need of clarity. This is especially so because of questions arising after the Fourth Circuit Court's decision last year in the case *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F. 3d 68 (4th Cir. 2020)[1].

For Virginia businesses, including those in the natural gas production, transmission, storage and distribution sectors, to remain competitive, regulatory certainty is crucial. This includes certainty as to what is needed to satisfy site suitability determinations. The applicable criteria must inform both the public and the project proponent and must do so in an objective and clear manner.

VA Code § 10.1-1307.E. sets forth four components of site selection criteria. All four components must be considered and weighed in making site suitability determinations. It is not appropriate to, for example, consider only the character and degree of injury to, or interference with, safety, health or the use of property (see subsection 1 of VA Code § 10.1-1307.E.) and/or the suitability of the proposed activity to the proposed area (see subsection 3 of VA Code § 10.1-1307.E.). Those criteria must be balanced against an analysis of the social and economic value of the proposed activity (e.g., increased employment opportunities and tax revenues) and the practicality of reducing or eliminating any discharge resulting from the proposed activity (see subsections 2 and 4 of VA Code § 10.1-1307.E.). Moreover, the benefits to the local community and beyond from the goods or services that will be generated by the proposed project, such as access to an adequate and affordable supply of natural gas, must be taken into account.

Local zoning decisions should continue to guide the site suitability analysis in the air permitting context. Respect should be given to the process by which a host locality makes zoning compliance decisions. Those processes include extensive public outreach and involvement and

[1] In addressing only two of the four statutorily required components of a site suitability analysis, the decision in this case has only added confusion to that caused by the withdrawal of the previously issued guidance.

allow for understanding the appropriateness of the proposed use for a given location. The regulation should recognize the important role of local zoning in demonstrating site suitability.

The site suitability standards must also take into account the wide variety of projects that require air permits and the different types of permits that apply to different proposed uses. Moreover, DEQ should retain the discretion to conclude that some facilities do not warrant site suitability analysis given minimal impact of the proposed use.

Finally, any new site suitability standards adopted by DEQ should apply only to new facilities. Developers and owners invested in existing facilities in rightful reliance upon permitting decisions including the then site suitability determination.

Thank you for your consideration of these comments.

Sincerely,

Lawton Mullins, President